TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 729.

THE CITIZENS' SAVINGS AND LOAN ASSOCIATION OF CLEVELAND, OHIO, PLAINTIFF IN ERROR,

vs.

THE CITY OF TOPEKA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED NOVEMBER 16, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 729.

THE CITIZENS' SAVINGS AND LOAN ASSOCIATION OF CLEVELAND, OHIO, PLAINTIFF IN ERROR,

vs.

THE CITY OF TOPEKA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

INDEX.

	Original.	Print.
Petition	1	1
Exhibit A	8	4
B	10	5
C	12	6
Security for costs	13	6
Summons	14	7
Marshal's return	15	7
Demurrer	16	8
Journal-entry	17	8
Opinion	18	9
Certificate	19	9
Writ of error	20	9
Citation	23	10
Stipulation	25	10

1 In the circuit court of the United States for the district of Kansas, eighth circuit.

THE CITIZENS' SAVINGS AND LOAN ASSOCIATION of Cleveland, Ohio, plaintiff,
vs.
THE CITY OF TOPEKA, IN THE COUNTY OF Shawnee and State of Kansas, defendant.
} No. 937.

DISTRICT OF KANSAS, *ss:*

Be it remembered that on the 27th day of March, A. D. 1874, came The Citizens Savings and Loan Association of Cleveland, Ohio, by Alfred Ennis, its attorney, and filed in the office of the clerk of the circuit court of the United States for the district of Kansas, at Topeka, in said district, its petition, Exhibits A, B, and C, precipe, and security for costs, which said petition, Exhibits A, B, and C, precipe, and security for costs are in the words and figures following, to wit:

Petition.

UNITED STATES OF AMERICA:

In the circuit court of the United States in and for the district of Kansas, to the June term, A. D. 1874.

THE CITIZENS' SAVINGS AND LOAN ASSOCIATION of Cleveland, Ohio,
vs.
THE CITY OF TOPEKA, IN THE COUNTY OF Shawnee and State of Kansas.
} Petition.

2 The Citizens' Savings and Loan Association of Cleveland, Ohio, a banking corporation duly organized and existing under and by virtue of the laws of the State of Ohio, located, residing, and doing business in the city of Cleveland, in the county of Cuyahoga and State of Ohio, and a citizen of the State of Ohio, plaintiff, by Alfred Ennis, its attorney, complains of The City of Topeka, in the county of Shawnee and State of Kansas, a municipal corporation duly organized and existing under and by virtue of the laws of the State of Kansas, a city of the second class, and a citizen of the State of Kansas, defendant, and says that heretofore, to wit, on or about the 15th day of August, A. D. 1872, the said defendant, the said city of Topeka, under and in pursuance of section seventy-six of an act of the legislature of the State of Kansas entitled, "An act to incorporate cities of the second class, and to repeal former acts," approved February 28th, A. D. 1872; also, an act of the legislature of the State of Kansas entitled, "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power, or other works of internal improvements, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2nd, A. D. 1872, to aid and encourage by donation thereto the King Wrought-Iron Bridge Manufactory and Iron-Works of Topeka, Kansas, a manufacturing corporation duly organized and existing under and by virtue of the laws
3 of the State of Kansas, (a copy of the charter of which is filed herewith, and made a part hereof, marked "Exhibit A,") in erecting,

establishing, equipping, maintaining, and operating bridge-shops for the manufactary of bridges within the corporate limits of the said city of Topeka, made, executed, issued, and delivered among others—being one hundred in all—eighty certain negociable bonds bearing date August 15th, A. D. 1872, whereby the said defendant by the terms and conditions contained in each of the said bonds, for value received, promised to pay twenty years after the date thereof to the said King Wrought-Iron Bridge Manufactory and Iron-Works of Topeka, Kansas, or bearer, one thousand dollars, with interest at the rate of seven per cent. per annum from date, payable semi-annually on the fifteenth days of February and August of each year, with interest coupons attached therefor, both the principal and interest of each of the said bonds was made payable at the banking-house of Winslow, Lanier & Co., in the city of New York and State of New York, which said bonds, in order to distinguish them for others of like character, were numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 64, 66, 67, 77, 78, 79, 80, 81, 82, 83, 85, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, a copy of each of which said bonds (except the number thereon) is filed herewith, and made part hereof, marked "Exhibit B."

That afterwards, to wit, on the 28th day of August, A. D. 1872, each of the said bonds was duly registered in the office of the auditor of the State of Kansas according to law, a copy of which registration is filed herewith and made part hereof, marked "Exhibit C."

That upon the making, executing, issuing, and delivery of the said bonds as aforesaid, the said King Wrought-Iron Bridge Manufactory and Iron-Works of Topeka, Kansas, in consideration therefor, and in full and complete compliance with all and singular the conditions upon which the said bonds were so made, executed, issued, and delivered, proceeded to and did at a great expense and outlay of money, to wit, at a cost of three hundred thousand dollars, erect, establish, equip, maintain, and operate bridge-shops within the corporate limits of the said city of Topeka, defendant, subject to taxation therein, the same being of great value, interest, and benefit to the said defendant.

That after the erecting, establishing, equipping, maintaining, and operating the said bridge-shops within the said corporate limits of the said defendant as aforesaid, the said defendant, as a part of the conditions upon which the said bonds were so made, executed, issued, and delivered for and during the year 1873, did assess, levy, and collect the regular city tax upon the said bridge-shops, as well as all the machinery and material connected therewith, and that the said defendant is now proceeding to assess, levy, and collect upon the said bridge-shops, as well as the said machinery and material belonging thereto, a similar tax for the year 1874.

That attached to each of said bonds, among others, was two certain interest coupons, bearing both the number and date of such bond, the same being the second and third interest coupons belonging to each of said bonds.

That by the terms and conditions of the said second of the said interest coupons, the said defendant promised to pay to the bearer, on or before the 15th day of August, A. D. 1873, thirty-five dollars.

That by the terms and conditions of the said third of the said interest coupons, the said defendant promised to pay to the bearer, on or before the 15th day of February, A, D. 1874, thirty-five dollars.

That each of the said interest coupons, except the numbers thereon, are in words and figures following, to wit:

"On or before the 15th day of August, 1873, the city of Topeka, Shawnee County and State of Kansas, promise to pay to the bearer thirty-five dollars, at the banking-house of Winslow, Lanier & Co., in the city of New York and State of New York, for value received, the same being for semi-an'nal interest due on City Bridge Shop-bond No. .

6

"ORRIN T. WELCH, *Mayor.*

"Attest:
"R. H. C. SEARLE, *City Clerk.*"

(Written on face:) 2.

"On or before the 15th day of February, 1874, the city of Topeka, Shawnee County and State of Kansas, promises to pay to the bearer thirty-five dollars, at the banking house of Winslow, Lanier & Co., in the city of New York and State of New York, for value received, the same being for semi-annual interest due on City Bridge Shop-bond No. .

"ORIN T. WELCH, *Mayor.*

"Attest:
"R. H. C. SEARLE, *City Clerk.*"

(Written on face:) 3.

That after the making, executing, issuing, and delivering of each of the said bonds by the said defendant, and before the maturity of the first interest coupon thereon, the said defendant proceeded to, and did, assess and levy a tax upon the taxable property within the corporate limits of the said city of Topeka, defendant herein, as provided by law for the payment of the first and second interest coupons attached to each of said bonds, at the maturity thereof; that the said taxes, so assessed and levied, was duly collected by the said defendant, and the said first interest coupon attached to each of said bonds was, at the maturity thereof, duly paid by the said defendant out of the said taxes so levied and collected for that purpose as aforesaid. That the said defendant, without any good reason for so doing, refused to pay the second of said coupons so attached to each of the said bonds as aforesaid, at the maturity thereof, notwithstanding the said taxes were collected, and the money was then, and is now, in the hands of the treasurer of Shawnee County, Kansas, for the purpose of paying the said second coupon.

7

That after the payment of the said first interest coupon as aforesaid, and before the maturity of either of the said bonds, and before either of the said second or third of the said *said* interest coupons became due and payable, each of the said bonds, with the said second and third interest coupons attached thereto, were, for value received, assigned, transferred, and delivered to the plaintiff.

That when each of the said interest coupons herein set out and described became due and payable, the same was duly presented for payment at the place where the same is made payable, and the payment thereof demand' and refused.

That the said interest coupons herein set out and described, there being one hundred and sixty of the same, for thirty-five dollars each, and in all amounting to five thousand six hundred dollars, with interest on two thousand eight hundred dollars thereof, at the rate of seven per

cent. per annum since the 15th day of August, A. D. 1873, and with interest on two thousand eight hundred dollars thereof at the rate of seven per cent. per annum since the 15th day of February, A. D. 1874, remain due and wholly unpaid.

8 Wherefore the plaintiff prays judgment against the said defendant for five thousand six hundred dollars, with interest on two thous' eight hundred dollars thereof, at the rate of seven per cent. per annum, since the 15th day of August, A. D. 1872; and with interest on two thousand eight hundred dollars thereof, at the rate of seven per cent. per annum since the 15th day of February, A. D. 1874, together with all other proper relief.

ALFRED ENNIS,
Atty. for Plaintiff.

EXHIBIT A.

STATE OF KANSAS,
Shawnee County, ss:

Know all men by these presents that the undersigned have this day voluntarily associated themselves together as a corporation, under the corporate name of "The King Wrought-Iron Bridge Manufactory and Iron-Works of Topeka, Kansas."

The purpose for which this corporation is formed is for the manufacture of bridges, and the transaction of such other manufacturing business as the board of directors may determine upon.

The business of the corporation to be transacted at the city of Topeka and State of Kansas.

The term for which this corporation is to exist is 99 years from the 9th day of July, 1872.

9 The number of directors shall be seven; and Theodore B. Mills, Byron M. Smith, Isaac T. Lockard, Russel B. Gress, residents of the city of Iola, in the county of Allen and State of Kansas; Henry E. Norton, a resident of the city of Emporia, in the county of Lyon and State of Kansas; Jonathan Pickard and Theodore Mills, residents of the city of Topeka, in the county of Shawnee and State of Kansas, are hereby appointed as directors for the first year.

The amount of the capital stock of this corporation is five hundred thousand dollars, divided into five thousand shares of one hundred dollars each.

In witness whereof we hereunto set our hands and seals this the 9th day of July, 1872.

THEODORE B. MILLS.	[SEAL.]
BYRON M. SMITH.	[SEAL.]
ISAAC T. LOCKARD.	[SEAL.]
JONATHAN PICKARD.	[SEAL.]
THEO. MILLS.	[SEAL.]

STATE OF KANSAS,
Shawnee County, ss:

Before me, Wm. Hall Jenkins, a notary public in and for said county and State, personally appeared Theodore B. Mills, Byron M. Smith, Isaac T. Lockard, residents of the city of Iola, in the county of Allen and State of Kansas; Jonathan Pickard, and Theodore Mills, residents of the city of Topeka, county of Shawnee and State of Kansas, all known to me to be residents as aforesaid, and acknowledged the execution of the foregoing charter of incorporation of "The King

10 Wrought-Iron Bridge Manufactory and Iron-Works of Topeka, Kansas," for the purposes and uses therein named, to be their voluntary act and deed.

In witness whereof I hereunto set my hand and official seal this 9th day of July, 1872.

[L. S.] WM. HALL JENKINS,
Notary Public.

I, W. H. Smallwood, secretary of state of the State of Kansas, do hereby certify that the above and foregoing is a true and correct copy of the original instrument of writing, filed in my office July 10, 1872.

In testimony whereof I have hereunto subscribed my name and affixed the great seal of the State. Done at Topeka this 10th day of July, A. D. 1872.

[SEAL.] W. H. SMALLWOOD,
Secretary of State.

(Endorsed:) The King Wrought-Iron Bridge Manufactory and Iron-Works. Copy of charter.

(Copy.)

EXHIBIT B.

Exhibit B.

UNITED STATES OF AMERICA:

No.]	*City bond.*	[Twenty years.
One thousand dollars.	City of Topeka, Shawnee County, State of Kansas.	State. Ad astra ad aspera.

Twenty years after date the city of Topeka, Shawnee County and State of Kansas, for value received, promises to pay to the King
11 Wrought-Iron Bridge Manufactory and Iron-Works of Topeka, Kansas, or bearer, the sum of one thousand dollars, with interest from date at seven per cent. per annum, payable semi-annually on the 15th days of February and August of each year, upon the presentation and surrender, as they severally become due, of the proper coupons therefor hereto attached, both principal and interest payable at the banking-house of Winslow, Lanier & Co., in the city of New York and State of New York. This bond is issued to aid & encourage The King Wrought-Iron Bridge Manufactory and Iron-Works, of Topeka, Kansas, in establishing and operating bridge-shops in said city of Topeka, under and in pursuance of section twenty-six of an act of the legislature of the State of Kansas entitled "An act to incorporate cities of the second class, and to repeal former acts," approved February 29th, 1872; also an act of the legislature of the State of Kansas entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2nd, 1872.

In witness whereof the said city of Topeka has caused this bond to be signed by Orrin T. Welch, mayor, and attested by R. H. C.
12 Searle, city clerk, this the 13th day of August, 1872.

[SEAL OF THE CITY OF TOPEKA.] ORRIN T. WELCH,
Mayor.

R. H. C. SEARLE, *City Clerk.*

EXHIBIT C.

STATE OF KANSAS, *ss:*

I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that the same has been duly registered in my office according to law.

SEAL OF THE AUDITOR OF THE STATE OF KANSAS. In witness thereof I hereunto set my hand and affix my seal of office at the city of Topeka this 28 day of August, 1872.

A. THOMAN, *Auditor.*

(Endorsed:) In the U. S. circuit court. No. 987. The Citizens' Savings & Loan Association of Cleveland, Ohio, vs. The City of Topeka, in the county of Shawnee and State of Kansas. Exhibits B & C. Filed March 27, 1874. A. S. Thomas, clerk.

13 *Security for costs.*

In the circuit court of the United States for the district of Kansas.

THE CITIZENS' SAVINGS AND LOAN ASSOCIATION of Cleveland, Ohio,
vs.
THE CITY OF TOPEKA, IN THE COUNTY of Shawnee and State of Kansas. } Security for costs.

I enter myself security for costs in said case, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and, in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this day of , 1874.

JAS. A. KING.

Approved:
A. S. THOMAS, *Clerk.*

(Endorsed:) In U. S. circuit court. No. 987. The Citizens' Savings and Loan Association of Cleveland, Ohio, vs. The City of Topeka, in the county of Shawnee and State of Kansas. Declaration. Filed M'ch 27, 1874. A. S. Thomas, clerk. Alfred Ennis, atty. for plaintiff.

14 And on this day, to wit, the 27th day of March, A. D. 1874, a writ of summons issued out of said clerk's office against the said defendant in said entitled cause, which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, district of Kansas, *ss:*

The United States of America to the marshal of the district of Kansas, greeting:

You are hereby commanded to notify the city of Topeka, in the county of Shawnee and State of Kansas, that it has been sued by the Citizens' Savings and Loan Association of Cleveland, Ohio, in the circuit court of the United States for the district of Kansas; and that unless it answers by the 26 day of April, A. D. 1874, the petition of the said The Citizens' Savings and Loan Association of Cleveland, Ohio, against it, filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this writ on the 6th day of April, A. D. 1874.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, at Topeka, in said district, this 27 day of March, A. D. 1874.

[SEAL.] A. S. THOMAS, *Clerk.*

15 Suit brought for the recovery of money. Amount claimed, $5,600, with interest from the 15th day of August, A. D. 1872, at the rate of 7 per cent. per annum on two thousand eight hundred dollars, & on two thousand eight hundred dollars since the 15th day of February, 1874, together with all costs.

ALFRED ENNIS,
Attorney for Plaintiff.

U. S. marshal's return.

DISTRICT OF KANSAS, *ss:*

Received the within writ the 27th day of March, 1874, and executed the same at Shawnee County, State and district of Kansas, this 28th day of March, A. D. 1874, by delivering personally to H. Bartling, mayor of the within-named defendant, The City of Topeka, Kansas, a full, true, and certified copy of the within writ, with all of the endorsements thereon, he being the officer designated by law to whom such service shall be made.

WM. S. TOUGH,
U. S. Marshal for the District of Kansas,
By C. L. VANDERPOOL,
Deputy.

Marshal's fees: Service of writ, $2.00.

(Endorsed:) No. 987. Circuit court of the United States, district of Kansas. The Citizens' Savings and Loan Association of Cleveland, Ohio, vs. The City of Topeka, in the county of Shawnee and State of Kansas. Summons. Issued M'ch 27, 1874; returnable April 6, 1874. Filed M'ch 31, A. D. 1874. A. S. Thomas, clerk. Alfred Ennis, attorney for plaintiff.

16 And on this day, to wit, the 17th day of April, A. D. 1874, came the said defendant by R. Burns, its attorney, and filed in the said clerk's office, its demurrer to plaintiff's petition in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

UNITED STATES OF AMERICA,
District of Kansas, ss:

In the circuit court in and for the district of Kansas.

THE CITIZENS' SAVINGS AND LOAN ASSOCIATION of Cleveland, Ohio, plaintiff,
vs.
THE CITY OF TOPEKA, IN THE COUNTY OF Shawnee and State of Kansas, def't. } Demurrer.

And now comes the said defendant, by Ross Burns, its attorney, and demurs to the petition of the said plaintiff, for the following cause:

1st. That the said petition of the said plaintiff does not state facts sufficient to constitute a cause of action against this defendant, and in favor of the said plaintiff.

Wherefore the said defendant, for the cause aforesaid, asks if the said plaintiff shall be permitted to have or maintain his said action thereof against this defendant.

ROSS BURNS,
City Atty. & Atty. for Deft.

17 (Endorsed:) The U. S. C. C. No. 987. The Citizens' Savings & Loan Association of Cleveland, Ohio, vs. The City of Topeka, in the county of Shawnee, State of Kansas. Demurrer. Filed April 17, 1874. A. S. Thomas, clerk. R. Burns, atty. for deft.

And on this day, to wit, the 11th day of June, A. D. 1874, at a term of the circuit court of the United States in and for the district of Kansas, begun and held at Leavenworth, in said district, on Monday, the first day of June, A. D. 1874—present, Hon. Samuel F. Miller, Hon. John F. Dillon, and Hon. C. G. Foster, judges; also Wm. S. Tough, U. S. marshal, Geo. R. Peck, U. S. attorney, and A. S. Thomas, clerk of said court—in the record of the proceedings thereof in the said entitled cause is the following entry, to wit:

Journal entry.

THURSDAY, *June 11th, A. D.* 1874.

THE CITIZENS' SAVINGS AND LOAN ASSOCIATION of Cleveland, Ohio,
vs.
THE CITY OF TOPEKA, IN THE COUNTY OF Shawnee and State of Kansas. } 987.

Now on this day comes the plaintiff herein, by Alfred Ennis, its attorney, and the said defendant, by Ross Burns, its attorney, and thereupon this cause came on for hearing upon the demurrer of said defend-
18 ant to the petition of the said plaintiff herein, and the same being argued by counsel, and the court being well advised in the premises, now sustains said demurrer; to which ruling and decision of the court the said plaintiff, by its attorney, excepts. Thereupon it is by the court now here considered, ordered, and adjudged that the said

defendant, The City of Topeka, in the county of Shawnee and State of Kansas, have and recover of and from The Citizens' Savings and Loan Association of Cleveland, Ohio, its costs in this action expended, taxed at , and that execution issue therefor.

In the above-entitled cause was filed the following opinion:

Opinion.

CITIZENS' SAVINGS & LOAN ASSO.
vs.
CITY OF TOPEKA.

I sustain the demurrer to the petition, for the reasons stated in my opinion in The Commercial Bank of Cleveland v. City of Iola, reported in 2 Dillon C. C. R.

JOHN F. DILLON, *Judge.*

19 *Certificate.*

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the record of all the proceedings had in said court in the case of The Citizens' Savings and Loan Association of Cleveland, Ohio, plaintiff, vs. The City of Topeka, in the county of Shawnee and State of Kansas, defendant, No. 987.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 23rd day of June, A. D. 1874.

[SEAL.] A. S. THOMAS, *Clerk.*

Writ of error.

20 UNITED STATES OF AMERICA:

The President of the United States to the judges of the circuit court of the United States for the district of Kansas, greeting:

Because, in the records and proceedings, and also in the rendition of a judgement of a plea which is in said circuit court before you, between The Citizens' Savings and Loan Association of Cleveland, Ohio, and The City of Topeka, in the county of Shawnee and State of Kansas, a manifest error hath happened, to the great damage of the said Citizens' Savings and Loan Association of Cleveland, Ohio, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be thereon given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday in October, 1874, in the Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid
21 being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this the 11th day of June, A. D. 1874.

[SEAL.] A. S. THOMAS, *Clerk.*

22 (Indorsed:) No. 987. The Citizens' Savings and Loan Association of Cleveland, Ohio, vs. The City of Topeka, in the county of Shawnee and State of Kansas. Writ of error. Filed June 11th, 1874. A. S. Thomas, clerk. Alfred Ennis, atty. for pltf.

23 *Citation.*

UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

To the city of Topeka, in the county of Shawnee and State of Kansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the second Monday in October, A. D. 1874, wherein The Citizens' Savings and Loan Association of Cleveland, Ohio, is plaintiff in error, to show cause, if any there be, why the judgement in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this the 11th day of June, A. D. 1874.

JOHN F. DILLON, *Judge.*

The city of Topeka, in the county of Shawnee and State of Kansas, hereby acknowledges service of the above and foregoing citation, this the 11th day of June, A. D. 1874.

THE CITY OF TOPEKA,
By ROSS BURNS, *City Atty.*

24 (Indorsed:) No. 987. The Citizens' Savings & Loan Association of Cleveland, Ohio, vs. The City of Topeka, in the county of Shawnee and State of Kansas. Citation. Filed June 11, 1874. A. S. Thomas, clerk. Alfred Ennis, atty. for pltf.

25 UNITED STATES OF AMERICA:

In the circuit court of the United States in and for the district of Kansas.

THE CITIZENS' SAVINGS AND LOAN ASSOCIATION of Cleveland, Ohio,
vs.
THE CITY OF TOPEKA, IN THE COUNTY OF Shawnee and State of Kansas.

It is hereby stipulated and agreed by and between the parties to the foregoing entitled action, that the following is a true and correct copy of the proclamation of the mayor of the city of Topeka, (defendant in said action,) calling the election for the voting of the bonds to which

the interest coupons sued on in said action belong, and in pursuance of which the said bond' were issued; that the same was published on the 17th day of July, 1872, in The Commonwealth, a daily newspaper of general circulation published in said city of Topeka; that said proclamation was published for three consecutive weeks before the holding of the election therein referred to in each newspaper published in the said city of Topeka, to wit, The Commonwealth, The State Record, and The North Topeka Times; that the ordinance set out in said proclamation was passed by the mayor and councilmen of said city of Topeka, and was published and took effect all as in said proclamation set forth.

26 *Mayor's proclamation.*

CITY MAYOR'S OFFICE,
City of Topeka, Kansas, July 17, 1872.

Whereas, on the 15th day of July, A. D. 1872, the mayor and councilmen of the said city of Topeka did pass the following ordinance, to wit:

[Ordinance No. 181.—Published July 17, 1872.]

An ordinance authorizing the city of Topeka, in the county of Shawnee and State of Kansas, to encourage and aid the King Wrought-Iron Bridge Manufactory and Iron-Works, of Topeka, Kansas, in permanently establishing, erecting, furnishing with all the necessary machinery, and continuing thereafter for the term of twenty years to operate bridge-shops at the said city of Topeka, by donating for such purposes one hundred thousand dollars in the bonds of the said city, to be voted and issued therefor.

Be it ordained by the mayor and councilmen of the city of Topeka—

SECTION 1. That a special election shall be held in the said city of Topeka, Kansas, on the 10th day of August, A. D. 1872, for the purpose of submitting to the qualified voters of said city the question of encouraging and aiding the King Wrought-Iron Bridge Manufactory and Iron-Works, of Topeka, Kansas, in permanently establishing, erecting, furnishing with all the necessary machinery, and continuing thereafter for the term of twenty years to operate bridge-shops at the said city of Topeka, by donating for such purpose one hundred thousand dollars in the bonds of the said city of Topeka, to be voted and issued therefor. The said bonds to be issued payable twenty years after the date thereof, bearing interest at the rate of seven per cent. per annum, payable semi-annually; both principal and interest payable in the city of New York, in the State of New York, which said bonds shall have interest-coupons attached, and shall be issued in denominations of one thousand dollars each, signed by the mayor, attested by the city clerk, and sealed with the seal of the said city.

SECTION II. That said election shall be held at the usual places of voting in the several wards of the said city of Topeka, and the polls shall be kept open from eight o'clock in the forenoon until six o'clock in the afternoon of said day, during which time the qualified voters of said city may cast their ballots on the question of instructing the mayor and councilmen of said city to make said donation and to issue the bonds of the said city therefore, as aforesaid, subject to the conditions hereinafter provided.

SECTION III. Those voting in favor of the proposition shall have written or printed on their ballots, "For the bridge-shops donation and bonds." Those voting against the proposition shall have written or printed on their ballots, "Against the bridge-shops donation and bonds."

SECTION IV. None of the said bonds of the said city of Topeka shall be issued and delivered until the said King Wrought-Iron Bridge Manufactory and Iron-Works, of Topeka, Kansas, shall execute to the said city of Topeka an undertaking in the sum of two hundred thousand dollars, with security, to *to* the approval of the mayor and councilmen of the said city for the faithful performing, completing, and carrying into effect the conditions hereinafter stated and to be performed on the part of the said bridge company, or, in case such undertaking is not given, then said bonds not to be issued until the said conditions shall first be fully performed and completed, which said conditions are as follows, to wit:

First. The said King Wrought-Iron Bridge Manufactory and Iron-Works, of the city of Topeka, Kansas, shall, within ninety days from the date of the voting of the said bonds, or so soon thereafter as the same can, with reasonable effort, be done, erect, furnish with all the necessary machinery and have in actual operation, bridge-shops within the corporate limits of the said city of Topeka, the said bridge-shops to be of four times the capacity of the present bridge-shops in the city of Iola, in the State of Kansas, and in accordance with the plans presented and on file in the city clerk's office of the city of Topeka, Kansas, for said shops, and to be permanently established in the said city of Topeka, and the said King Wrought-Iron Bridge Manufactory and Iron-Works to contract with and obligate itself to the said city of Topeka, with security in the sum of $100,000, to be approved by the mayor and councilmen to so permanently establish and continue thereafter for the term of twenty years to operate the said bridge-shops in the said city of Topeka.

Second. That when the said bridge-shops at the said city of Topeka shall be completed and in operation as aforesaid, then the further manufacture of bridges at the said city of Iola to be suspended and to not be again resumed by any of the parties connected with the said King Wrought-Iron Bridge Manufactory and Iron-Works of Topeka, Kansas.

Third. Said company shall have a bona-fide permanent paid-up capital of five hundred thousand dollars invested in said business.

SEC. 5. That upon the said King Wrought-Iron Bridge Manufactory and Iron-Works, of Topeka, Kansas, executing and delivering to the said city of Topeka the said undertaking in the sum of two hundred thousand dollars, with security to the approval of the mayor and councilmen of the said city of Topeka for the faithful performing, completing, and carrying into effect the said conditions on the part of the said "King Wrought-Iron Bridge Manufactory and Iron-Works" to be performed, or, in the event such undertaking is not given, then upon the performing and completing the said conditions to the satisfaction of the said mayor and councilmen, in either case there shall be issued and delivered to the said King Wrought-Iron Bridge Manufactory & Iron-Works, as a donation, the bonds of the said city in the sum of one hundred thousand dollars, in sums of one thousand dollars each, with interest-coupons attached, and payable in twenty years from the date thereof, with interest at the rate of seven per cent. per annum, payable semi-annually, both principal and interest payable in the city of New York, in the State of New York; said bonds to be signed by the mayor, attested by the city clerk, and sealed with the seal of said city; and the said bonds, when so issued and delivered, shall be in full for the said donation proposed to be made to the said King

Wrought-Iron Bridge Manufactory and Iron-Works for the performing and completing the conditions as aforesaid.

SEC. 6. The returns of the said election shall be made and the votes canvassed according to the rules and regulations provided by law for holding elections. The mayor of the said city of Topeka shall issue his proclamation of said election, as provided by law, and such proclamation shall be published as required by law.

SEC. 7. This ordinance shall take effect and be in force from and after its passage and publication once in the Kansas Daily Commonwealth.

Approved July 15th, 1872.

ORRIN T. WELCH, *Mayor.*

Passed the council July 15th, 1872.

d67-1t R. H. C. SEARLE, *City Clerk.*

And whereas the said ordinance was approved by me on the said 15th day of July, A. D. 1872, and was published once in the Kansas Daily Commonwealth on the seventeenth day of July, A. D. 1872:

Now, therefore, I, Orrin T. Welch, mayor of the said city of Topeka, in pursuance of law, do proclaim and make known that a special election will be held in the city of Topeka on the tenth day of August, A. D. 1872, for the purpose of submitting to the qualified voters of the said city the question of encouraging and aiding the King Wrought-Iron Bridge Manufactory and Iron-Works, of Topeka, Kansas, in permanently establishing, erecting, furnishing with the necessary machinery, and continuing thereafter for the term of twenty years to operate bridge-shops in the said city of Topeka, by donating to the said King Wrought-Iron Bridge Manufactory and Iron-Works one hundred thousand dollars in the bonds of the said city, said bonds to be issued in denominations of one thousand dollars each, with interest-coupons attached, and made payable twenty years after the date thereof, with interest at the rate of seven per cent. per annum, payable semi-annually in the city of New York, and subject to the conditions, restrictions, and limitations as provided in the foregoing ordinance. These voting in favor of the proposition shall have written or printed on their ballots, "For the bridge-shops donation and bonds." Those voting against the proposition shall have written or printed on their ballots, "Against the bridge-shops donation and bonds." The polls will be open on the said day in the several wards of the city of Topeka at the following places, and the persons hereinafter named will act as judges and clerks of said election:

First ward.—At the McMeekin House: Judges, H. Burgess, D. M. Adams, and Ben. McMeekin; clerks, J. Davis and J. V. Admire.

Second ward.—At the calaboose on 5th street, between Kansas avenue and Quincy street: Judges, M. Handley, E. E. Strait, and J. G. Searle; clerks, S. S. Bragg, and J. E. Baldwin.

Third ward.—At W. H. Reed's meat-market, No. 298 Kansas avenue: Judges, J. C. Chesney, W. W. Phillips, and W. H. Reed; clerks, S. H. Wood, and T. L. King.

Fourth ward.—At S. Rain & Co.'s livery-stable office on Sixth avenue, between Jackson and Van Buren streets: Judges, D. H. Horne, A. W. Knowles, and J. S. Higgins; clerks, G. F. Merriam, and W. S. Jewell.

In testimony whereof I have hereunto set my hand and caused the seal of the city of Topeka, Kansas, to be affixed the day and year first above written.

ORRIN T. WELCH, *Mayor.*

Attest:

R. H. C. SEARLE, *City Clerk.*

27 It is hereby further stipulated and agreed by and between said parties that the said proclamation herein set forth, containing the said ordinance, be attached to and made a part of the record in said action, and to have the same force and effect as if the same had been set forth in and made a part of the declaration in said action.

This the 16th day of September, 1874.

ALFRED ENNIS,
Atty. for Plaintiff.
ROSS BURNS,
City Atty. of City of Topeka.

(Indorsment on cover :) No. 729. The Citizens' Savings and Loan Association, of Cleveland, Ohio, plaintiff in error, vs. The City of Topeka, Kansas. C. C. U. S. Filed 16th November, 1874.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1874.

THE CITIZENS' SAVINGS AND LOAN ASSOCIATION, OF CLEVELAND, OHIO,
Plaintiff in Error,

vs.

THE CITY OF TOPEKA, KANSAS,
Defendant in Error.

ARGUMENT OF ROSS BURNS AND A. L. WILLIAMS.

JOHN FAREY, Printer, Topeka.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1874.

THE CITIZENS' SAVINGS AND LOAN ASSOCIATION, OF CLEVELAND, OHIO,
Plaintiff in Error,
vs.
THE CITY OF TOPEKA, KANSAS,
Defendant in Error.

ARGUMENT OF DEFENDANT IN ERROR.

On the 18th day of August, 1872, the city of Topeka issued $100,000 in bonds as a donation to the King Bridge Company, to aid and encourage said company " in erecting, establishing, "equipping and operating bridge shops for the manufactory of "bridges, within the corporate limits of the said city of "Topeka." (See page 2 of plaintiff's brief)

When the first coupons became due they were met by taxes paid by the citizens, and the bonds were afterwards bought by the plaintiff, in good faith, and for a valuable consideration.

These bonds, it is claimed by plaintiff, were issued in pursuance of Section 76, of Chap. 100, of the Laws of 1872, found on page 215, and entitled "An act to incorporate cities of the "2d class, and to repeal former acts," approved February 28th,

1872, also, an act of the legislature of the State of Kansas, entitled "An act to authorize counties, incorporated cities and mu- "nicipal townships to issue bonds for the purpose of building "bridges, aiding in the construction of railroads, water power "or other works of internal improvements, and providing for "the registration of such bonds, the registration of other bonds, "and the repealing of all laws in conflict therewith," approved March 2, 1872. All of said laws bearing upon this case are set out in full in plaintiff's brief, and will not, therefore, be inserted here.

The city of Topeka refuses to pay the interest on these bonds; and the questions presented are:

1st. ARE THE LAWS IN QUESTION CONSTITUTIONAL?

2d. IS THE CITY, BY REASON OF ITS PAYMENT OF THE FIRST COUPONS, ESTOPPED TO DENY THE VALIDITY OF THE BONDS?

Preliminary to the discussion of these questions, however, we wish to present another view of this case:

THE LEGISLATURE NEVER IN FACT AUTHORIZED THE ISSUE OF THESE BONDS.

Sec. 76 of the act first referred to, grants *unlimited* power, (and for that reason, by the way, violates Sec. 5 of Art. XII of the Constitution of the State of Kansas,) to cities of the 2d class to aid, by donation of bonds, in the establishment of manufactories, but the act itself, being in fact the charter of the city, provides no way by which the matters preliminary to the issue of bonds can be settled, such as the election, the proclamation therefor, the canvass of the votes, etc.

The fact is that the bonds were issued under Chap. 68, Laws of 1872, as will fully appear by plaintiff's statement of the case. Plaintiff says that a petition of one fifth of the voters of the city was presented to the Council as a prerequisite to obtaining the order for the election. The charter, which, for convenience of reference we will hereafter call the first law, and the other the second, nowhere requires such a petition; Sec. 4 of the second law expressly requires it.

Notice of said election was given for three consecutive weeks by publication in a newspaper. No such notice is required by the first law; under Sec. 4 of the second law it is necessary. The bonds were registered by the Auditor of State.

Such registration is necessary under the second law; it is not under the first. It will be plainly seen by an examination of plaintiff's brief, that the bonds were issued under the second law, and that law, we think, shows upon its face that it was never intended to cover the issue of these bonds. The title of that law has heretofore been given. The power conferred is found in Sec. 1, (laws of Kansas, 1872, page 110), and it authorizes cities like Topeka to issue bonds "for the purpose of "building bridges, free or otherwise, or to aid in the construction "of railroads or water power, by donation thereto, or the taking "of stock therein, or for other works of internal improvement." We might here remark, that this act does not in terms or by necessary implication authorize the *donation* of bonds to aid anything but railroads or water power, but we waive that question.

Within which of the classes authorized to receive aid in municipal bonds does the donee of these bonds come?

Notwithstanding an elaborate argument in our Supreme Court to show a complete parallel between physicians and printing presses and railroads, we think it safe to affirm that "bridge "shops for the manufacture of bridges," are neither a railroad nor water power; neither are such shops a bridge, "free or other- "wise." They must, then, to be entitled to aid under the law, fall within the general term of "other works of internal improve- "ment?" Are they works of internal improvement? To answer this question requires an examination of the meaning of this term. Congress, the author of the expression, we believe, declares "internal improvements" to mean and include "roads, railways. bridges, canals and improvement of "water courses and draining of swamps." (U. S. S., Vol. 5, Sec. 9, p. 455). This, then, may fairly be taken to be the legislative definition of the term. Of course, in our advanced civilization, since the time of the act referred to, (1841,) many other things may now be included in the term; but they must all have relation to works similar to those mentioned; they must be works intended to reclaim barren places, to open communication between distant and thitherto inaccessible places, to provide easy transportation where none existed before, to utilize the waste forces of nature, and generally, to overcome *natural* dis-

advantages. Beyond this, works of internal improvement do not go, unless an enlargement of the term may be found in modern legislation or usage. We have been unable, after diligent search, to find any decision, law, or usage which gives greater scope to the expression than that given by Congress. The argument that anything which adorns, beautifies or adds to the wealth of a community is a work of internal improvement proves too much. If bridge shops are works of internal improvement merely because they bring people to a place, give new life to enterprise, furnish every man cheap iron bridges in lieu of wooden ones, furnish a market for scrap iron, add to the taxable property and thereby diminish the burdens of taxation, and incidentally benefit the community, then, by a parity of reasoning, hotels, pest houses, theatres, slaughter houses, executive mansions, churches, hospitals, jails, the calaboose and all other similar works which the advanced civilization of the age demands, (and has), are also works of internal improvement.

We think, then, that the law in question does not confer, or attempt to confer upon municipal corporations the power to aid such enterprises as these bridge shops, either by taking stock therein or by donation thereto, and that the plaintiff must base the validity of his bonds on Sec. 76 of the first law.

There is another view of this case, however. Assuming that the acts in question are constitutional, it still follows that these bonds are void for want of authority to issue them. When the legislature authorizes by law, the donation of bonds to a specific enterprise, the legislative determination of the public purpose of such aid will influence a court in case of doubt, to favor the validity of the law, but in this case no statute has been, or can be cited which authorizes aid to this particular enterprise. It is conceded that taxes can only be imposed for public purposes. It will also be granted as a matter of course, that the presumption of law is in favor of the validity of a statute; that is, that a legislature would pass no law prohibited by the constitution. The two laws in question provide for aid, by donation, as follows:

Sec. 76, Chap. 100, authorizes cities to aid in the "establish-
" ment of manufactories and such other enterprises as may tend
" to develop and improve such city, either by direct appropria-

"tion from the general fund, or by the issuance of the bonds of "the city."

Sec. 1, Chap. 68, permits cities to issue bonds to aid in the "building of bridges, free or otherwise, or to aid in the con- "struction of railroads or water power, by donation thereto, or "the taking of stock therein, or for other works of internal im- "provement." It will be observed that the only works specifically mentioned in either law are bridges, railroads and water power, and these the legislature may fairly be presumed to have thereby designated as public purposes. But power was also granted to aid in certain other kinds of works mentioned generally as "manufactories, other enterprises, and other works of in- "ternal improvement," and no restriction was placed upon the power of the city except the *implied one* that whatever the work was, it should be public. So many works fall under the general head of "manufactories," and so many more under the general designation, "other enterprises," that the legislature could only grant the power to aid them in general terms, but with the emphatic, implied restriction that the end to be attained by any work undertaken by the city should be a public one. Nor can it be successfully asserted that the legislature thereby vested in the city a discretionary power to determine what was a public purpose. No such power could be delegated. No such power was thought of. The legislature properly thought that each locality was the best judge of what public improvements it needed, and so vested in the various municipalities, a discretion as to the number of improvements they would make, the amount they would expend, etc., but always with the restriction that the work aided should be public. If it were possible for the legislature to vest in a city, the right to say conclusively, uncontrolled by courts, what is a public purpose, it would necessarily carry with it the right to declare what is a "manufactory." And if this were so, the city might issue bonds to aid a "manufactory," to wit: a beer garden, and the courts would be powerless to protect us. The legislature which can only impose taxes for public purposes, never meant by these laws to impose them in aid of strictly private works, but did mean to allow the city, in its discretion, to aid manufactories, which, though owned by private persons, serve a public, municipal purpose; such as a manufact-

tory of gas, with which to light our streets and public buildings; or to aid "other enterprises," public in their ends, such as street railways, water works, etc.

If, under these laws, the city had the power to issue the bonds in question, it had and has equal constituional power to aid, by its bonds, the erection of a distillery or ten pin alley.

But if both laws authorize the issue of such bonds, we claim that they are invalid, because of the unconstitutionality of the laws in question.

This brings us to the questions discussed in plaintiff's brief.

If the authority to issue the bonds is found under Sec. 76 of Chap. 100, (and that it must be found there, if indeed it exists, we think we have shown,) then we say, that section violates Sec. 5, Art. XII of the Constitution of the State of Kansas. That section reads as follows:

"Sec. 5. Provision shall be made by general law for the or-"ganization of cities, towns and villages; and their power of "taxation, assessment, borrowing money, contracting debts, and "loaning their credit, shall be so restricted as to prevent the "abuse of such power."

The law, or rather the particular section conferring the power, contains no restriction as to the amount which the city may issue to aid manufacturing enterprises. The failure of the legislature to limit and restrict the power so as to prevent abuse, violates the section above referred to and makes the law unconstitutional. A great many authorities are cited by plaintiff to show that a failure to restrict the power of taxation does not affect the validity of the law, but that the constitutional provision is directed to the discretion of the legislature with no check upon its exercise, except the honesty and intelligence of the law makers themselves. This is an undoubted and melancholy truth when a discretionary power has been exercised at all by the legislature; and most, if not all, of the authorities cited go only to this extent. It is conceded, of course, that where a discretionary power has been exercised by the legislative branch of a government, no other branch of the government can review the matter and, in the exercise of *its* discretion, declare that such a power has been abused. If it were otherwise the judiciary would become an appellate legislature with power to make laws,

and every law by which rights are secured, property guarded and public policy established, would take shape, color or validity from the peculiar views or ideas of the particular judge before whom it was brought for review. Indigestion, and its laws, would become inextricably interwoven with legislative enactments.

In this case, however, there has been no abuse of discretionary power, but an absolute failure and refusal to exercise it by limiting and restraining the power of the city to issue its bonds for the particular purpose mentioned in section 76. Had the legislature *limited* the amount to a particular sum, courts would probably not interfere, even if satisfied that the discretion had been grossly abused; but here there is no limitation.

Section 3, Art. XI of the Constitution of Wisconsin is exactly like Sec. 5, Art. XII of the Constitution of Kansas. The Legislature of that State, by an act authorized the city of Kenosha, "to borrow on the corporation credit of the city *any* sum "of money, for any *term* of time, and at any rate of interest, "and payable at *any* place deemed expedient, and to issue bonds "or scrip therefor." The city afterwards issued $100,000 of its bonds to aid a railroad, which action of the city was subsequently ratified by an act of the legislature.

The constitutionality of the act authorizing the issuance of the bonds coming in question before the Supreme Court of the United States, the following language was used by Justice Nelson, in delivering the opinion of the Court:

"The act of 1857, of the legislature, which amends and con-
"solidates the several acts relating to the charter of the city,
"confers full authority upon the common council to borrow on
"the corporate credit of the city, any sum of money, for any
"term of time, at any rate of interest, and payable at any place
"deemed expedient, issuing bonds or scrip therefor. It is ad-
"mitted this authority would be sufficient, but it is insisted that
"the statute exceeds the authority of the legislature under the
"third section of the eleventh article of the State Constitution,
"which it is asserted, requires the legislature to limit or restrict
"the amount of money to be raised by the city. Without in-
"quiring into this question, it is sufficient to say, that after the
"city had passed the ordinance lending its credit to the rail-

"road company, to the amount of one hundred thousand dollars, "the legislature ratified it. This was equivalent to an original "limit of this amount."

This language, which is quoted by plaintiff as sustaining its theory of this case, is very significant, and shows at least that the court were not fully satisfied as to the constitutionality of the first act, but were satisfied that the original unconstitutionality of the law, if it existed, had been cured by the subsequent ratification, which "was equivalent to an original limitation of "the amount"; a proposition too evident to need argument. But in this case there has been no such ratification.

The Supreme Court of Wisconsin has decided (Foster vs the city of Kenosha, 9 Wis. p. 616,) that this act was unconstitutional; a decision which would have been followed by this court, we presume, if the same court had not previously held the law to be valid. The provision of our constitution is almost identical with the Wisconsin section—in fact we believe ours is taken from Wisconsin—and there has been in our State no decision on the question; hence, although the last decision of the Supreme Court of that State will not be followed in cases coming from Wisconsin under that law, it ought to be almost of controlling force in similar cases from this State.

But we say, that both acts of our legislature, in so far as they attempt to impose a tax upon our people to support or aid the King Bridge Shops, violate both our Constitution and those fundamental principles which underlie our form of government, and are void; and that the bonds issued under their authority are void, either in the hands of the original holders or subsequent purchasers in good faith.

The plaintiff lays down in the opening argument, these propositions:

1st. THAT THE POWER TO MAKE LAWS IS VESTED IN THE LEGISLATURE.

2d. THAT A LAW WILL BE HELD VALID UNLESS ITS UNCONSTITUTIONALITY CLEARLY APPEARS.

3d. THAT "[redacted] THE SPIRIT OF THE CONSTITUTION" AS AN INTERDICTION UPON LEGISLATIVE POWER IS REPUDIATED BY COURTS.

These self-evident and conceded propositions are followed by many pages of citations which merely re-state them in the different forms of expression used by various courts—some using stronger qualifying adjectives than others.

At this day it is useless to discuss the question whether municipal corporations may rightfully be taxed to aid in the construction of railroads, and equally useless in this court, to insist that the construction of statutes authorizing such aid is a local, statuory question belonging exclusively to the state courts, and not a question of general law. But it is proper to inquire whether the acts in question are without the scope of legislative power, or violate any of the fundamental principles of free governments.

It is very commonly said that the federal government is one of delegated powers, and the state government of non-delegated or general powers. This, in the sense in which it is used, is true, but the argument of counsel for plaintiff, that it is true of Kansas, and that the legislature may do anything which it is not expressly prohibited by the constitution from doing, is too broad.

Our Constitution, at least, is a grant of enumerated powers. It creates the legislature, the executive and the courts, defines their duties, grants and limits their powers.

Sec. I, Art. II, says: "The legislative power of this State "shall be vested in a house of representatives and senate." Then follow many sections prescribing rules for the government of the legislature, delegating it certain powers in some matters and restricting it in others.

Before this grant of powers, however, the people in their Bill of Rights declare as follows:

"Sec. 2 All political power is inherent in the people, and all "free governments are founded upon their authority, and are "instituted for their equal protection and benefit. No special "privileges or immunities shall ever be granted by the legisla- "ture, which may not be altered, revoked or repealed by the "same body, and this power shall be exercised by no other tri- "bunal or agency."

"Sec. 20. This enumeration of rights shall not be construed "to impair or deny others retained by the people, and all pow- "ers not herein delegated remain with the people."

Under our Constitution, then, with its restrictions and limitations has the legislature the power to compel, by law, the citizens of Topeka to contribute to the erection and maintainance of bridge shops? Or, to state the question squarely, is such enforced donation taxation or robbery? This power, if it exists, is claimed under the law making power and the power to levy and collect taxes; and we are defiantly told to point out the precise clause of the Constitution which prohibits its exercise.

Under a constitution like ours of delegated and limited powers, sustained by the assertion that "all powers not herein dele-"gated remain with the people," we may well call upon the other side to show the clause which authorizes such legislation. The answer is, "the legislature is vested with the power to make "laws; the power to make laws includes the power to make "laws levying taxes; the legislature passed the law, ordered the "taxes to be collected; therefore the law is constitutional, the "tax is valid." But is a legislative enactment necessarily a law unless it violates some specific limitations imposed by the constitution? In Kansas, where the line between legislative and judicial authority is not yet definitely settled in the legislative mind, we have many illustrations to show that all enactments, though called laws, are not so, even where no constitutional provision, express in its terms, has been violated.

In 1869, the legislature adopted a new method for assessing railroads, and provided that either the Auditor of State or railroad companies, if dissatisfied with the assessment, might appeal to the Supreme Court, where the assessment should be made *de novo*. The Supreme Court, not anxious to assume this novel honor, declared the law unconstitutional because it sought to impose duties upon the judicial branch of the government foreign to the purposes of its creation. (The Auditor vs. the A. T. & S. F. R. Co., 6 Kansas, p. 500.) The court say: "It would "be absurd to claim that it is in the power of the legislature to "clothe this court with authority to review acts purely executive "in their character, by giving an appeal therefrom to this court;" and yet there is no express limitation to prevent the legislature from doing this ridiculous thing. It was merely not among the duties of the judiciary as gathered from the whole of our written constitution, as well as the "spirit" (so scoffed at by the plaintiff), of that instrument.

The legislature, wishing to be just, as well as generous, sometime takes the power from the judiciary and confers it upon itself. Thus, in 1871, it settled a disputed question in the following "law: "

"Section 1. That Emma Jane Gird is hereby declared the "sole heir of Hugh Quinn, who died in battle in the year 1863, "leaving no blood relations whomsoever, and who, in his dying "moments, desired his property to decend to the said Emma "Jane Gird, who was his affianced wife."

This enactment violates no *special* clause of the Constitution limiting the power of the legislature, and yet it will hardly be called a law. It is true that it invades the right of the judiciary, but if, as is contended, the legislature is the sole judge of its own right to pass a law, unless restricted by some positive prohibition, who shall decide whether it is a usurpation of judicial powers? If the courts in such a case should interfere and declare such a law unconstitutional because it was an invasion of the rights of the judiciary and an usurpation of powers not legislative in their nature, would they not have power to declare that a law which compels our citizens to aid by taxation a private enterprise, invades the rights reserved by the people and is not within the power of legislation?

We think, therefore, that an enactment may be made by a legislature which is not a law notwithstanding it may not violate any precise, specific clause of the Constitution.

The power to make laws means the power to make laws to act as rules of government—general laws prescribing the rights, duties and privileges of the citizen as a member of the government, and not arbitrary orders which transfer the property of one man to another merely because the legislature believes it right to do so.

If a law were passed in Kansas expressly authorizing "private "property to be taken for public use without just (or any) com-"pensation," our courts, all courts, would declare that such a law was invalid. And yet Kansas—unlike most other States—does not prohibit the exercise of this power either in the Constitution or Bill of Rights, nor has the 5th amendment of the Constitution of the United States any bearing upon this case, for that has frequently been held to be a check upon the powers of the general government only.

The taking of the property of one person and giving it to another, with or without pay, is not within the province of the legislature, and any attempt by statute to do so is void, irrespective of any constitutional prohibition of such acts.

Cooley's Constitutional Lim., 530
39 N. Y., 171.
38 Miss., 421.
52 Maine, 265.
3 N. Y., 511.
18 Ill., 502.
11 Minn., 496.
8 O. S., 333.
51 Penn. St., 167.
31 Vermont, 236.
16 Mass., 83.

IS THE BURDEN LAID UPON OUR PEOPLE TO PAY THESE BONDS IN ANY JUST SENSE A TAX?

Whatever other difference of opinion may exist as to the nature and requisites of a tax, it will be conceded that, irrespective of constitutional provisions, it can only be raised as revenue for public or governmental purposes, and that any attempt to compel the payment of money for purely *private* purposes is void, no matter under what name the imposition is called.

Who shall determine what is a public purpose? The Courts. It is essentially a judicial question, and no legislative declaration of the public purpose of a proposed tax, will, or should have any weight, if, upon an inspection of the statute authorizing such tax, it is apparent that the purpose is purely a private one. The power of taxation is practically unlimited. The citizen may complain, justly, that an unwise policy has made the burden of taxes too heavy to be borne, that the bankruptcy of the community will follow the collection thereof, but if no constitutional limit has been exceeded, no court will give him relief. While his property is being sold for taxes, and taken from him, he can find consolation in the thought that the only check upon the power of taxation is in the justice, the honesty and the

intelligence of his representatives, and that he, as one of the sovereigns, can aid at the next election in putting in a new experimentalist in the science of taxation.

But let the same power lay a burden for a very wise but private purpose upon the people, and the same man may, if the proposed tax but touch, however lightly, the sensitive nerves of his pocket book, go into any competent court and be relieved from the burden. In neither case do the courts pay any attention to the question whether the proposed exaction is wise or otherwise. Is it authorized is all they determine? In the one case the tax is affirmed, however burdensome it may be, because it is declared to be a proper charge by the taxing power; in the other it is denid because it invades the rights which the people reserved out of their grant of powers in the constitution.

It has been frequently urged, and may be again in this case, that the legislature is the proper judge of what is a public purpose because, practically, it can and does donate money, raised by taxation, to any purpose that it desires to aid, irrespective of the character of the object aided. This is unfortunately true in this State, but it only proves that a legislature has the power (not the right) to misappropriate the revenue which has been properly raised by taxation. This grows out of the fact that so much tax is raised for general current expenses, by taxation, without specifying to what particular purpose such revenue shall be applied. Thus the legislature might absolutely donate $1,000 to some fellow without even the pretence that it was in payment of any obligation whatever, but such donation would not prove that the tax which raised that $1,000 was illegal. But suppose the legislature should levy a specific tax for the purpose of raising the money for such purpose, would it be contended that the collection of such tax could be enforced? The purpose, then, for which taxes are raised, determines their validity, and the courts are the tribunals to decide whether the purpose is public or private.

That taxes can only be levied for public purposes seems to be too well settled to require any extended argument. Almost every court in in the Union has so declared. All the authorities which go to make up an almost unbroken chain of decisions affirming the validity of bonds issued to aid in the con-

struction of railroads, do so upon the ground and the sole ground, that railroads are public or governmental agencies, and that a tax to pay such bonds is for "public purposes." Courts differ widely in the reasons given for sustaining the validity of laws authorizing aid to railroads; some asserting that the fact that the right of eminent domain may be exercised in behalf of railroads, proves that taxation may be resorted to to aid them; others declare in favor of such aid because they judicially determine that railroads are governmental agencies, and that the exercise of the right of eminent domain, is not the evidence of that character, but incident to it; others still, base their decisions upon the inexorable law of precedent; but all reach at last the common ground, that the end to be attained is essentially public.

The Supreme Court of Kansas, in the case of Miller vs. The Commissioners of Leavenworth Co., (7 Kan., p. 479,) take strong ground in favor of the constitutionality of bonded aid to railroads, and in as careful, well considered and exhaustive an examination as can be found in any report, grouped together and stated all the arguments for and against such aid, and arrived at the conclusion, *of course*, "that if it were not for the public "purpose to be attained by the building of such roads, no aid "could constitutionally be given them." In the course of the opinion the court abandoned the usual illustration used in argument against such power i. e., the parallel between railroads and stage coaches, hotels, etc., and supposed the case of a strictly private railroad not used as a public agency, not controlled by government, and not obtaining its right of way by eminent domain, but by purchase, and in such a case, the court say, no aid by donation of bonds would be valid. Judge Valentine in the opinion says:

"The whole question depends upon the ultimate object, use, "or purpose intended by the government in granting the aid to "railroad companies—whether that object, use, or purpose is "public or private, and not upon the nature or character of the "means used in effecting or accomplishing that object."

Again:

"And we might here say that we admit what are claimed to "be the three fundamental principles of taxation: 1st. Taxa-

"tion must be for a public, and not merely a private purpose. "2d. The taxes must be properly apportioned. 3d. The dis- "trict taxed must have a special interest in, and be specially "benefitted by the thing for which the taxes are levied. Tax- "ation is not an independent power, to be exercised aside from "the other powers of the government. No society of men "ever organized into a government, or into a municipal corpo- "ration, for the mere purpose of taxing themselves. The power "of taxation can never be invoked except in aid of one of the "other powers. It is not of itself a sufficient foundation upon "which to build any other power or action of the government. "It is only a servant of the other powers, and can only be exer- "cised in their support. And if the right to make county and "municipal subscriptions to railroad companies is founded upon "no other power except the power of taxation, we admit it has "no foundation whatever, and must of course fall."

The court again says:

"It will be admitted that a strictly private railroad corpora- "tion might be organized under the authority of the legislature, "a corporation whose powers and duties would be similar in all "respects to other private carriers of freight and passengers; "such as the proprietors of stage coaches, hacks, drays, etc; "and while such railraad corporation would be relieved, as "other private carriers of freight and passengers are, from many "of the restraints and duties of a public or *quasi* public railroad "corporation; while it would, of course, be free to carry any "kind of freight it choose, or any class of passengers it choose, "when it choose, or exclude all, and carry freight only for "itself, yet it could not exercise the right of eminent domain "as a public or *quasi* public railroad corporation does. It "would have to purchase the land over which it should con- "struct its road; but if the owner of the land would not sell, "it could not build its road; its progress would necessarily "come to an abrupt termination.

The court again says:

"We can suggest however, a more exact parallel, a closer "analogy than any that has yet been suggested, and still it will "not be claimed by the plaintiffs in error that it proves any- "thing in their favor

"Of all the different kinds of strictly private business that "exists, or may be imagined, that of a strictly private railroad "corporation, such as we have heretofore supposed might be "organized under the authority of the legislature, would come "nearest in similitude to that of a *quasi* public railroad corpor- "ation, such as are actually organized; and yet the dissimilarity "between the two corporations would be just great enough to "destroy the desired inference sought to be drawn from their "resemblance. We will admit that the strictly private corpor- "ation would not be entitled to receive public aid, but that does "not at all prove that the *quasi* public corporation would be in "the same condition."

Chief Justice Black, in the case of Sharpless vs. Phila. 21 Penn. St., p. 147, says:

"The legislature has no constitutional right to create a public "debt or authorize a municipal corporation to do it, in order to "raise funds for a mere private purpose. No such authority "passed to the assembly by the general grant of legislative "power. This would not be legislation. Taxation is a mode "of raising revenue for public purposes. When it is prostituted "to objects in no way connected with the public interests or "welfare, it ceases to be taxation and becomes plunder. "Transferring money from the owners of it into the possession "of those who have no title to it, though it be done under the "name and form of a tax, is unconstitutional, for all the reasons "which forbid the legislature to usurp any other power not "granted to them. An act of the legislature authorizing con- "tributions to be levied for a mere private purpose, or for a pur- "pose which though it be public is one in which the people from "whom they are exacted have no interest, would not be a law, "but a sentence commanding the periodical payment of a cer- "tain sum by one portion or class of people to another. The "power to make such orders is not legislative but judicial, and "was not given to the assembly by the general grant of legisla- "tive authority."

Judge Dillon, in deciding the Iola case, says: [9 Kas. 701.]

"And thus we have presented the inquiry, than which no "question concerning the property rights of the citizen is of "more transcendent moment, viz: whether the legislature may

"thus compel or coerce the citizen to aid in the establishment "of purely private enterprizes or objects, because these will or "may incidentally promote the general good of the community "or locality. I think it safe to affirm that no such principle "has yet received judicial sanction. On the contrary, the princi- "ple has been declared unsound by courts of the highest respecta- "bility. The general subject of the extent of the taxing power "in connection with municipal aid to railways has been "thoroughly discussed in a majority of the States of the Union, "and recently by the Supreme Court of the United States. "(*Orcutt vs. Supervisors, and Railroad Co. vs. Otoe County*, "December term, 1872.) The courts every where have agreed "that taxes can lawfully be imposed for public purposes only."

And the Supreme Court of the United States say in the case of *Orcutt vs. Supervisors of Fon-du-lac Co.*, 16 Wallace, 678, Strong, J. delivering the opinion of the court:

"The taxing power of the state extends no further than to "raise money for a public use, as distinguished from private, or "to accomplish some end public in its nature. * * * "No one contends that the power of a State to tax, or to author- "ize taxation, is not limited to the uses to which the proceeds "may be devoted. Undoubtedly taxes may not be laid for a "private use."

In Cooley's Constitutional Limitations, pp. 487, 494; the following language is used:

"In the first place, taxation having for its only legitimate "object the raising of money for public purposes and the proper "needs of government, the exactions of moneys from the citi- "zens for other purposes is not a proper exercise of this power, "and must therefore be unauthorized. In this, however, we do "not use the word *public* in any narrow and restricted sense, "nor do we mean to be understood that whenever the legislature "shall over-step the legitimate bounds of their authority, the "Courts can interfere to arrest their action. There are many "cases of unconstitutional action by the representatives of the "people which can be reached only through the ballot box; and "there are other cases where the line of distinction between "that which is allowable and that which is not is so faint and "shadowy, that the decision of the legislature must be accepted

"as final, even though the judicial opinion might be different. "But there are still other cases where it is entirely possible for "the legislature so clearly to exceed the bounds of due authority "that we cannot doubt the right of the Courts to interfere to "check what can only be looked upon as ruthless extortion, pro- "vided the nature of the case is such that judicial process can "afford relief. An unlimited power to make any and every- "thing lawful which the legislature might see fit to call taxation, "would be, plainly stated, an unlimited power to plunder the "citizens." * * * * * * * *

"When, therefore, the legislature directs the levy of a tax "for a purpose not public, and which cannot properly be made "a public burden on any of the grounds above indicated, or "which if public cannot properly be made to rest on the district "taxed, we must conclude that they are exercising an authority "not conferred in the general grant of legislative power, and "which is therefore unconstitutional. 'The power of taxation,' "says an eminent writer, 'is a great governmental attribute, "'with which the courts have very wisely, as we shall hereafter "'see, shown extreme unwillingness to interfere; but if abused, "'the abuse should share the fate of all other usurpations.' In "the case of burdens thus assumed by the legislature on behalf "of the State, it must be very rare indeed that a remedy can be "afforded in the Courts. It would certainly be a very danger- "ous assumption of power for a court to attempt to stay the "collection of state taxes because an illegal demand was in- "cluded in the levy; and indeed, as state taxes are not usually "levied for the purpose of satisfying specific demands, but a "gross sum is raised, which it is calculated will be sufficient for "the wants of the year, the question is not one usually of the "unconstitutionality of taxation, but of the misappropriation "of moneys which have been raised by taxation. But when the "state orders a city, township, or village to raise money by tax- "ation for a specific purpose, and that purpose is one in no de- "gree tending to the public benefit, and this fact is plain and "palpable, the usurpation is also in the same degree, plain and "palpable, and a court of competent jurisdiction could not feel "at liberty to decline to enforce the paramount law."

The use, then, or purpose of a thing to which aid may legally be voted must be a public one, and the proper question is not, what are the means employed, but what is the end to be attained. If the end in view be public, it makes no difference whether the means used are private or public. If, on the other hand, the end is private, the use of public means will not alter the case and make the proposed aid valid.

In the incorporation of the Bank of the United States, the end sought was public, i. e., the distribution of currency, the collection of moneys due the government, etc., but the means employed were private. In a case arising under that law, Chief Justice Marshal, says:

"The bank is not considered as a private corporation whose "principal object is individual trade and individual profit, but "as a *public corporation*, created for *public and national purposes*. "That the mere business of banking is in its own nature a pri- "vate business, and may be carried on by individuals and com- "panies having no *political connection* with the government, is "admitted; but the bank is not such an individual company. "*It was not created for its own sake, or for private purposes.* It "has never been supposed that congress could create such a "corporation. It is not an instrument which the government "found ready made, and was supposed to be adapted to its pur- "poses, but one which was created in the form in which it now "appears, for *national purposes only*. While it is the great "instrument by which the fiscal operations of the government "are effected, *it is also trading with individuals for its own* "*advantage*. The appellant endeavors to distinguish between ,, this trade and its *agency for the public*, between its banking "operations and those qualities which it posseses in common "with every other corporation, such as individuality, immortal- "ity, etc." 9 Wheaton, 860, 861.

We have said that the Courts should decide, in a proper case, whether the object or end in view is public or private, and this is well established by authority. True, Courts have frequently in their anxiety not to appear to interfere with the legislative power, held that in any but very plain cases the legislative determination of the public nature of a burden is conclusive; that the question as to how much or how little public interest there

is in a given project for which a tax is levied belongs exclusively to the legislature. And such is the true rule for the government of Courts, although in these days when the various branches of government are power-mad, and legislatures recklessly invade the powers of the other branches of the government and the equally sacred reserved rights of the people, the reason upon which the rule is founded, namely, the presumption that the legislature which enacts and the executive who approves, are fully informed, and would not sanction an invalid law, has, and should have, less weight than formerly. But even those courts which go farthest in sustaining a legislative enactment merely because it is a legislative enactment, have never yet said, and it is to be hoped never will, that a purpose, to support which a tax is necessary, is public merely because the law making power says so, when an examination of the act in question unmistakably shows that the use, purpose and end to be attained are strictly private, and only the means used are public.

In what just sense can bridge shops "for the manufactory of "bridges" be called public? What public, governmental end do they subserve?

The plaintiff's counsel has a novel way of settling the question. He attempts to prove, not that the works to be aided here are *public*, but that railroads which *have* been aided by bonds, are *private*. (see page 39 of plaintiff's argument.) Were it pertinent to this case we would cheerfully admit that all legislation by which taxes are levied to aid railroads is unconstitutional, but how such an argument or such an admission would aid the plaintiff we fail to see. If it is successfully shown that railroads and the purposes they subserve are essentially private, it only proves that the long series of judicial decisions affirming the validity of bonded aid are all wrong—the very principle upon which such aid has been held valid being that the purposes for which railraods are used are public—and not that aid to these works, by the issue of municipal bonds, is right. To state the position logically, "bridge shops and railroads and "the ends to be attained by their use, are private. Laws "authorizing the donation of municipal bonds to aid in the "construction of railroads have been held valid by this court; "*therefore*, similar laws permitting donations of municipal

"bonds to bridge shops are valid." The court, if it adopted the major premise, would very illogically but legally say: "You "are right in logic, therefore you are wrong in law; the major "premise being true, there was no legal authority to issue the "bonds you hold, and when a proper railroad case comes up, "we will, if still of your opinion, refuse to declare the law "valid under which it claims."

But if, as all the Courts say, the plaintiff is wrong, and the ends to be attained by the construction of railroads are public, at least to the extent of authorizing cities to be taxed to help build them, does it follow that the public has such an interest in the building of bridge shops for manufacturing bridges as will support taxation in their aid? Where is the fancied analogy between railroads and bridge shops? In what case can the government confer upon both the same privileges, or impose upon both the same restraints? Do "bridge shops" make distant points come nearer together? Do they open up to settlement any portion of the country which, but for their presence, would remain unsettled? Do they supply means by which access to different parts of the country is made easier? Do they do anything but supply buildings in which an industry as old as government itself may be carried on for the sole benefit of the owners?

To the validity of aid by donations of bonds, to such purposes there can be brought neither the construction of courts, nor of the legislature, nor usage. Bridge building was a private industry, exercised by all classes of community, before this government was. Wooden bridges were used before this company was in existence and will be used when it is forgotten, and, so long as municipalities pay for the bridges they build and use, they will, we imagine, be exempt from compulsory payment for those they don't use. Wooden bridges will continue to be constitutional, and if the city pays for the bridges—iron or wooden—which it has built, and the people submit to taxation to pay for the same, it will be under no legal or moral obligation to tax itself to buy buildings in which to manufacture the work it buys. Where then is the public use, or end to sustain taxation?

It is said by courts that any enterprise which may exercise the right of eminent domain, may also be aided by taxation. Is it

not equally true that any work which the public may be compelled to aid by taxation, may exercise the right of eminent domain? The fact that the power of taxation is more generally exercised and more quietly submitted to, than the exercise of the other power, only proves that taxation is more generally necessary. The fact that in many cases taxation is an admitted power, and the other denied by a community, only shows that a government has less frequent occasion to resort to the latter than the former. Many cases will suggest themselves to the Court where both powers unquestionably exist, and yet, while one is admitted without a question, the other will be denied. A State wishes to build a state house, for instance. It has the right both to levy a tax for that purpose and to condemn land for a site by its power of eminent domain. It does levy and collect the tax, because without it the work could not be done; it does not take the land simply because it is unnecessary—there being no difficulty in purchasing suitable grounds—but the *right* remains. Could the legislature authorize the taking of private property for a site for these bridge shops? Surely not. This is no enterprise having for its object the use of some waste power of nature, such as a water power, for instance, which makes it essential that a particular site should be selected. It could be built any place in the city, out of the city, or out of the State with equal benefit to itself, (or to Topeka.) It furnishes no means to aid a public end which we do not already possess. It meets no public requirement, subserves no end of government. It owes no duty to the public, is under no control by the authorities; it works for whom it pleases, when it pleases, and where it pleases. The public cannot fix for it, rate of charges for work; cannot compel it to do public in preference to private work; cannot compel it to do work. In short, the public can compel it to do nothing. We cannot even compel it to maintain its shops for a single day. Counsel for plaintiff says we can compel the company to keep up its shops here because it has given the city a bond to do so! Counsel here falls into an error by not noting the distinction between the *powers* of a government as a government, and the *legal rights* of the city as a party to a private contract. Government, that is the State, cannot force the company to maintain its shops at Topeka, but the courts can award us damages for a breach of the

contract, (if valid), precisely as they can in a case between individuals. But no legislative power can by any enactment, give to that contract greater force or vitality than it had when made. No new remedy can be afforded, no new terms can be interpolated in the contract. Our rights are private; are defined by our contract, and what these rights were when we made the contract, they still are, always will be, and no governmental power on earth can change them. It is not true, then, that the government as a government, can compel this company to do anything.

What other analogy do they bear to railroads as a public agency? They incidentally benefit us by adding to the taxable property of the city, and thus lessen the burdens of the taxpayers! The Texas cattle dealer who brings in twenty thousand head of cattle, (and the Spanish fever,) adds largely to the taxable property and revenues, (if we succeed in catching him at tax-gathering time,) of a place. The builder of a hotel adds to our wealth; every improvement aids us in this way. The livery stables, blacksmith shops, theatres, clothing stores and cigar stands add to the sum total of our taxable property, but are we authorized to aid, by taxation, any of these enterprises?

But these bridge shops bring to us hundreds of hardy, skilled mechanics with their families, and thus "aid the public" by increasing the population of the city! So do all the thousand useful avocations of life. Where houses are to be built carpenters will be found. Wherever there is a demand there will be a supply, produced by a law which these shops neither created nor can alter. But is any one who furnishes work for a mechanic entitled to a donation from the public? Other agencies not physical or tangible bring people to a place. The moral character of a community, its sobriety, temperance, virtues, integrity and industry attract many people, and the best kind of people, too; but ought we for that reason to put a money bounty upon the virtues, raise a sum of money by taxation and distribute the same among those whose more conspicuous goodness, in the judgment of the taxing powers, brought about the increase. Churches bring people, but we aid them only by private donations. Another agent more potent for good (or evil) than any

other private instrument is the newspaper, especially if its proprietor is an agent for the sale of railroad lands. It brings more people to a new State in a year than bridge shops would in a thousand years, and yet we are only taxed voluntarily to support it. Population is increased without immigration, and yet the proud matron to whose triplets have been awarded a blue ribbon and an oreide medal at the county fair, never dreams that she is entitled to bonds to aid her in her industry. The argument might be kept up forever, and the analogy between these shops and railroads become more faint and shadowy as their resemblance to purely private purposes become more plain and distinct.

ESTOPPEL.

We have frequently heard of the "higher law"; we knew that it was founded upon the belief that "man is more than "constitutions," and that it was above all constitutions. We had supposed, however, that it was one of those moral truths recognized only in the Courts of Conscience, and of no binding force in Courts of Law, whose powers are granted and defined in written Constitutions. It seems, however, that this "higher power," is, after all, only the law of estoppel. That the doctrine of estoppel applies as well to corporations, public and private, as to individuals is too plain for argument, or the vast citation of authorities contained in the argument of counsel for plaintiff But that the payment of interest on bonds which could not, under our Constitution, be issued, estops the city to deny their validity, is a propositition supported by neither reason or authority. That the acts of a corporation in excess of authority, or irregularly done, may be ratified by the subsequent conduct of the corporation, or by act of the legislature, we concede. That even in a case where bonds were issued without constitutional authority, if a consideration, a legal consideration, were received therefor, such consideration might be recovered, we are not prepared to deny. But we do deny that the bonds themselves could, under any circumstances, be collected. To hold that, under any circumstances, the law of estoppel could give validity to bonds which could not be con-

stitutionally issued is to place the doctrine of estoppel above the Constitution. It would present the anamoly of making valid the act of an agent which was beyond the power of the agent to do; which was not authorized by the principal; which could not be authorized or ratified by the principal; which the power from whence the principal derived its power could not authorize or ratify when done; which *no power* in existence could authorize or ratify.

In Marshall County vs. Cook, 38 Ill., 44, it was held, that "bonds issued without an election or when the election was "called by a wrong authority, are void, for want of power to "issue them, in whose hands soever they may be, *and are not "validated by the levy of taxes and the payment of interest "thereon.*"

Judge Dillon, in his work on municipal corporations, says: "In favor of *bona fide* holders of negotiable securities the cor- "poration may be estopped to avail itself of irregularities in the "exercise of power conferred; but it may always show that "under no circumstances could the corporation lawfully make "a contract of the character in question." Sec. 381.

Again in Sec. 386: "A municipal corporation may ratify the "unauthorized acts and contracts of its agents or officers which "are *within the corporate powers*, but not otherwise."

The same writer after an examination of all the recent decisions on the vexed question of municipol aid to railroads, sums up the argument in Sec. 426: "It may be remarked, "in conclusion, that this general survey of the adjudications "shows some difference of Judicial opinion, (chiefly in cases "involving the rights of innocent holders of negotiable munic- "ipal securities) respecting the evidence of the compliance "with conditions precedent, and as to what will estop the "municipality from showing a non-compliance in fact with such "conditions. Yet, aside from these differences, the Courts all "agree that such a corporation may successfully defend against "the bonds in whosesoever hands they may be, if its officers "or agents, who assumed to issue them, had no power to do so. "The officers of such corporations posses no general power to "bind them, and have no authoity except such as the legislature "confers. If the statute authorizes such a corporation to issue

"its bonds *only* when the measure is sanctioned by a majority "of the voters, bonds issued without such a sanction, (either in "fact or according to the decision of some authorized body or "tribunal,) or when voted to one corporation and issued to "another, are void, into whosesoever hands they may come. "This is the sound and true rule of law on this subject, and the "one which has had the almost uniform approval of the State "Courts in this country, and has recently received the high sanc- "tion of the upreme Court of the United States. The distinction, "however, must be observed between want of power to issue "the bonds and irregularities in the exercise of the power, "which are unavailing against the *bona fide* holder, without "notice of the irregularity,"

With a few suggestions we submit the case to the Court. Kansas has foolishly burdened herself with a load of debt to aid railroads almost to heavy to be borne. She illustrates to day fully the graphic picture drawn twenty-one years ago by Chief Justice Black. He says in the Sharpless case: "If the power "(the power to aid railroads by taxation) exists, it will continue "to be exerted, and generally it will be used under the influence "of those who are personally interested, and who do not see or "care for the ultimate injury it may bring on the people at "large. Men feel acutely what affects themselves, as individ- "uals, and are but slightly influenced by public considerationsr "What each person wins by his enterprise, is all his own; the "public losses are shared by thousands. The selfish passion is "intensified by the prospect of immediate gain; private specu- "lation becomes ardent, energetic and daring, while public "spirit—cold and timid at best—grows feebler still when the dan- "ger is remote. Under these circumstances it is easy to see where "this ultra-enterprising spirit will end. It carried the State to "the verge of financial ruin; it has produced revulsions of trade "and currency in every commercial country; it is tending now "and here, to the bankruptcy of cities and counties."

These burdens, the courts say, are valid; and we submit. But we do say there is a limit beyond which the power to take our property to give to others should not go, and we think this case sharply defines that limit. To compel us to aid these works would not be taxation. but, in the emphatic language of Judge Black, *plunder*.

Dr. Adam Smith, complaining of the duties imposed by the mercantile system, as we complain of the *duties* of "the aid to manufactories" system, says: "Such duties never could have "been imposed had not the mercantile system taught us, in "many cases, to employ taxation as an instrument, not of rev- "enue, but of monopoly."

The City of Topeka, "the young and growing capital" etc., does not "interpose the plea of the *infant*, the *feme covert*, the *non compos mentis*," nor does it "repudiate" any debt, however unwisely contracted. Topeka is largely in debt but the interest on all it *owes* is paid pomptly. No one ever has or ever will resort to the courts to compel the paymenet of any *debt* she owes—bonded or otherwise. But this pretended debt we have not paid, and do not intend to pay until this Court says we shall, for the simple reason that we never contracted it, never were authorized to contract it, and that our agents transcended any authority they had, or could have, in issuing the bonds.

The case is simply this. This company having robbed the City of Iola of a large amount of bonds, abandoned that city; came to Topeka; was organized, as its charter shows, on the 9th day of July, 1872; s*ix days after* its organization it procured the passage of an ordinance (July 15) ordering an election for these bonds; had the election held on the 10th day of August; had the bonds issued and pocketed on the 15th day of August, and to-day holds and owns them.

Were it not for some statement of facts in the pathetic finale of plaintiff's argument it might be irrelevant for us to add that the "shops" which the company erected at an expense of $300,000, are to day assessed at $40,000—an assessment, by the way, of which they complain as being twice the value of the "shops"—that they are only "used and maintained" in plaintiff's argument; that the workmen are not here, the building itself an uninhabited wilderness of brick, and that the musical clank of what little machinery they have been prevented from moving to Cleveland, Ohio, by the vigilance of creditors, will be heard for the first time in this Conrt.

It was in the beginning, is now, and has always been a bond swindle, in plain anguage, and we believe that we have both the

moral and legal right to avoid the payment of the bonds issued in aid thereof.

Judge Dillon's opinion in this case, which amply vindicates itself, may be found either in 9 Kan., p. 700, or 2 Dillon's Report, p. 353.

We append hereto, not by way of authority but for convenience of reference, a table of cases chronologically arranged, containing, we believe, all the authorities on the subject of municipal aid to railroads; all of which show that a tax, to be constitutional, must be for a public purpose.

ROSS BURNS and
A. L. WILLIAMS
Attorneys for the City of Topeka.

APPENDIX.

Goodin vs. Crumps, Leigh, 1837, 140.
Harrison Justices vs. Holland, 3 Gratton, 1846, 236.
Langhorn vs. Robinson, 20 Gratton, 1871, 661.
5 Call. 1871, 139.
Bridgeport vs. Housitonic R. R. Co., 15 Conn. 1843, 475.
Society for Savings vs New London, 29 Conn., 1846, 174.
Harvey vs. Lloyd, 3 Penn. St., 1846, 331.
Commonwealth vs. McWilliams, 11 Penn. St., 1849, 62.
Sharpless vs. Mayor Phila., 21 Penn. St., 1853, 188.
Moers vs. City of Reading, 21 Penn. St., 1853, 158.
Commonwealth vs. Com'rs Alleghany Co., 32 Penn. St., 1858, 218.
Commonwealth vs. Pittsburgh, 41 Penn. St., 1868, 278.
Commonwealth vs. Perkins, 43 Penn. St., 1862, 400.
Nichols vs. Nashville, 9 Humph. 1848, 252, 271.
L. & N. R Co. vs. Davidson Co., 1 Sneed, 1854, 637.
Hord vs. Rogersville. etc., R. R. Co., 3 Head, 1859, 208.
Byrd vs. Ralston, 3 Head, 1859, 477.
Justices Campell Co. vs. K. & K. R. R. Co., 6 Colowell, 1869, 598.
Talbot vs. Dent, 9 B, Monroe, 1849, 556.
Justices &c. vs. P. W. & K. R. Turnpike Co., 11 B. Monroe, 1850, 143.
Slack vs. M. & C. R. R. Co., 13 B. Monroe, 1852. 1.
Maddox vs. Graham, 2 Metc., 56.
Ryder vs. A. & S. R. R. Co., 13 Ill. 1851, 516.
Prettyman vs. Sup. Tazewell Co., 19 Ill., 1858, 406.
Robertson vs. Rockford, 21 Ill., 1829, 451.
Johnson vs. Stark Co., 24 Ill., 1860, 75.
Perkins vs. Lewis, 24 Ill., 1860, 208.
Butler vs. Dunham, 27 Ill., 1861, 474.
Clark vs Hancock Co., 27 Ill., 1862, 305.

Piatt vs. People, 29 Ill., 1862, 54.
Keithsburgh vs. Frick, 34 Ill , 1864, 405.
Colton vs. Co. Comm's, 6 Fla., 1852, 610.
C. N. & Z. R. R. Co. vs. Comm'rs Clinton Co., 1 Ohio St., 1852, 77.
R. W. vs. Treasurer N. Tp-, 1 Ohio St., 1852, 105.
Cass vs. Dillon, 2 Ohio St., 1853 607.
Thompson vs. Kelley, 2 Ohio St., 1853, 647.
State vs. Van Horn, 7 Ohio St., 1857, 327.
State vs. Union Tp., 8 Ohio St., 1858, 394.
State vs. Com'rs Hancock Co., 12 Ohio St., 1861, 596.
Knox vs. Nichols, 14 Ohio St., 1863, 260.
Fosdick vs. Perrysburg, 14 Ohio St., 1863, 472.
Shoemaker vs. Coshen Tp., 14 Ohio St., 1863, 569.
Police Jury vs. Suc. of McDonough, 8 La., an., 1853, 341.
New Orleans vs. Graeble, 9 La., an., 1854, 561.
Parker vs. Scogin, 11 La., an., 1856, 629.
V. S. & T. R. W. Co. vs. Parish of Ovacheta, 11 La., an., 1856, 649.
D. & P. R. R. Co. vs. Dubuque, 4 G. Greene, 1853, 1.
State vs. Bissell, 4 G. Greene, 1854, 328.
Clapp vs. Cedar Co., 5 Iowa, 1857, 15.
Ring vs. Johnson Co., 6 Iowa, 1858, 265.
McMillan vs. Boyles, 6 Iowa, 1858, 304.
McMillan vs. Lee Co., 6 Iowa, 1858, 391.
Whittaker vs. Johnson Co., 10 Iowa, 1859, 161.
Stein vs. Mayor Mobile, 24 Ala., 1854, 591.
Wetemepka vs. Winter, 29 Ala., 1857, 651.
Gibbons vs. Mobile, &c., 36 Ala., 1860, 410.
Strickland vs. Miss. Central R. R. Co., 1854, not reported.
Williams vs. Commack, 27 Miss., 1854, 224.
Taylor vs. Newburn, 2 Jones, Eg., 1855, 151.
Caldwell vs. Justices of Bank, 4 Jones, Eg., 1858, 323.
City of St. Louis vs. Alexander, 23 Mo., 1856, 483.
Flagg vs Palmyra, 33 Mo., 1863, 440.
St. Jo. & C. R. R. vs. Buchannan Co., 39 Mo., 1867, 485.
Grant vs. Carter, 24 Barb., 1857, 232.
Benson vs. Mayor of Albany, 24 Barb., 1857, 248.
Clark vs. City of Rochester, 24 Barb., 1857, 446.
Bank vs. Rome, 28 N. Y., 1858, 38.
Gould vs. Town of Venice, 29 Barb., 1859, 442,
Starin vs. Genoa, 23 N. Y., 1861, 439.
Clark vs. Rochester, 28 N. Y., 1866, 605.
People vs. Mitchell, 45 Barb,, 1865,, 208.
People vs. Mitchell, 35, N. Y., 1866, 551.
Copes vs. Charleston, 10 Rich. 1857, 491.
Winn vs. Macon, 21 Ga., 1857, 275.

Powers vs. Dougherty Co., 23 Ga., 1857, 65.
Aurora vs. West, 9 Ind., 1857, 74.
Evansville R. R. Co. vs. Evansville, 15 Ind., 1860, 395.
Bartholomew Co. vs. Bright, 18 Ind., 1862, 93.
Aurora vs. West, 22 Ind., 1864, 88.
Com'rs Knox Co., vs. Aspinwall, 21 How., 1858, 539.
Same vs. Wallace, 21 How., 1858, 547.
Zabriskie vs. R. R. Co., 23 How., 1859, 381.
Bissell vs. City of Jefferson, 23 How., 1860, 287.
Amey vs. Alleghany Co., 23 How., 1860, 365.
Com'rs Knox Co., vs. Aspinwall, 23 How., 1860, 376.
Woods vs. Lawrence Co., 1 Black, 1861, 386.
2 Black, 1862. 722.
1 Wall., 1863, 80, 175, 272, 291 and 384.
3 Wall., 1865, 93. 294, 327 and 654.
4 Wall., 1866, 270, 275 and 535.
6 Wall., 1869, 166, 210, 514 and 518.
7 Wall., 1868, 181 and 313.
9 Wall., 1879, 477.
Clark us Janesville, 10 , Wis., 1859, 136.
Bushnell vs. Beloit, 10 Wis., 1860, 195.
Patteson vs. Yuba Co., 13 Cal., 1859, 165.
Hobart vs. Butte Co., 17 Cal., 1860, 23.
Robinson vs. Bidwell, 22 Cal., 1863, 329.
French vs. Teschewakee, 24 Cal., 1864, 518.
People vs. Coon, 25 Cal., 1864, 635.
People vs. San. Erancisco, 27 Cal., 1865, 655.
Augusta Bank vs. Augusta, 49 Me., 1860, 507.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1874.

The Citizens' Savings and Loan Association of Cleveland, Ohio,
Plaintiff in Error,

vs.

The City of Topeka, Kansas,
Defendant in Error.

ARGUMENT OF

ALFRED ENNIS,

Attorney for Plaintiff in Error.

THE COMMONWEALTH PRINT, TOPEKA, KAS.

UNITED STATES OF AMERICA.

IN THE

Supreme Court of the United States.

TO THE OCTOBER TERM, 1874.

The Citizens' Savings and Loan Association, of Cleveland, Ohio,
Plaintiff in Error,
vs.
The City of Topeka, in the County of Shawnee and State of Kansas,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF KANSAS.

STATEMENT OF THE CASE.

This was an action commenced by the plaintiff in error against the defendant in error, in the Circuit Court of the United States for the District of Kansas, at the June term thereof, 1874, to recover the amount due upon one hundred and sixty interest coupons, for thirty-five dollars each, the same being for two instalments of interest due upon eighty bonds, of one thousand

dollars each, issued by the defendant in error. The petition is as follows:

PETITION.

United States of America. In the Circuit Court of the United States in and for the District of Kansas.

To the June Term, 1874.

The Citizens Savings and Loan Association, of Cleveland, Ohio,
vs.
The City of Topeka, in the county of Shawnee and State of Kansas.

The Citizens' Savings and Loan Association, of Cleveland, Ohio, a banking corporation, duly organized and existing under and by virtue of the laws of the State of Ohio, located, residing and doing business in the City of Cleveland, County of Cuyahoga, and State of Ohio, and a citizen of the State of Ohio, plaintiff, by Alfred Ennis, its attorney, complains of the City of Topeka, in the County of Shawnee, and State of Kansas, a municipal corporation, duly organized and existing under and by virtue of the laws of the State of Kansas, a city of the second class, and a citizen of the State of Kansas, defendant, and says that heretofore, to-wit, on or about the 15th day of August, 1872, the said defendant, the said City of Topeka, under and in pursuance of Section seventy-six of an Act of the Legislature of the State of Kansas, entitled "An Act to incorporate cities of the second class, and to repeal former Acts;" approved February 28th, A. D. 1872. Also an Act of the Legislature of the State of Kansas, entitled, "An Act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water power, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith;" approved March 2d, A. D. 1872. To aid and encourage, by donation thereto, the King Wrought Iron Bridge Manufactory and Iron Works of Topeka, Kansas, a manufacturing corporation, duly organized and existing under and by virtue of the laws of the State of Kansas—a copy of the charter of which is filed herewith and made part hereof, marked exhibit "A"—in erecting, establishing, equipping and operating bridge shops for the manufactory of bridges, within the corporate limits of the said City of Topeka, made, issued and delivered, among others—being one hundred in all—eighty certain negotiable bonds, bearing date August 15th, A. D. 1872, whereby the said defendant, by the terms and conditions contained in

each of the said bonds, for value received, promised to pay, twenty years after the date thereof, to the said King Wrought Iron Bridge Manufactory and Iron Works of Topeka, Kansas, or bearer, one thousand dollars, with interest at the rate of seven per cent. per annum from date, payable semi-annually, on the fifteenth days of February and August of each year, with interest coupons attached therefor. Both the principal and interest of said bonds were made payable at the banking house of Winslow, Lanier & Co., in the City of New York, and State of New York, which said bonds, in order to distinguish them from others of like character, were numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 64, 66, 67, 76, 77, 78, 79, 80, 81, 82, 83, 85, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99—a copy of each of which said bonds (except the number thereon,) is filed herewith and made a part hereof—marked exhibit "B."

That afterwards, to-wit, on the 28th day of August, A. D. 1872, each of said bonds was duly registered in the office of the Auditor of the State of Kansas, according to law—a copy of which registration is filed herewith and made part hereof, marked exhibit "C."

That upon the making, executing, issuing and delivering of said bonds as aforesaid, the said King Wrought Iron Bridge Manufactory and Iron Works of Topeka, Kansas, in consideration therefor, and in full and comp'ete compliance with all and singular the conditions upon which the said bonds were so made, executed, issued and delivered, proceeded to and did, at a great expense and outlay of money, to-wit: at a cost of three hundred thousand dollars, erect, establish, equip, maintain and operate bridge shops within the corporate limits of the said City of Topeka, defendant, subject to taxation therein, the same being of great value, interest and benefit to the said defendant.

That after the erecting, establishing, equipping, maintaining and operating the said bridge shops within the corporate limits of the said defendant, as aforesaid, the said defendant, as a part of the conditions upon which the said bonds were so made executed, issued and delivered, for and during the year 1873, did assess, levy and collect the regular city tax upon the said bridge shops, as well as all the machinery and material connected therewith, and that the said defendant is now proceeding to assess, levy and collect upon the said bridge shops, as well as the said machinery and material belonging thereto, a similar tax for the year 1874.

That attached to each of said bonds, among others, were two certain interest coupons, bearing both the number and date of such bond, the same being the *second* and *third* interest coupons belonging to each of said bonds.

That by the terms and conditions of the said *second* of the said interest coupons, the said defendant promised to pay to the bearer, on or before the 15th day of August, A. D. 1873, thirty-five dollars.

That by the terms and conditions of the said *third* of the said interest coupons, the said defendant promised to pay to the bearer, on or before the 15th day of February, A. D. 1874, thirty-five dollars.

That each of the said interest coupons, except the numbers thereon, are in words and figures following, to-wit:

"On or before the 15th day of August, 1873, the City of Topeka, Shawnee county and State of Kansas, promises to pay to the bearer THIRTY-FIVE DOLLARS, at the banking house of Winslow, Lanier & Co., in the city of New York and State of New York, for value received, the same being for semi-annual interest due on city bridge shop bond No.....

"ORRIN T. WELCH, Mayor.

"Attest: R. H. C. SEARLE, City Clerk."

"On or before the 15th day of February, 1874, the City of Topeka, Shawnee county and State of Kansas, promises to pay to the bearer THIRTY-FIVE DOLLARS, at the banking house of Winslow, Lanier & Co., in the city of New York and State of New York, for value received, the same being for semi-annual interest due on city bridge shop bond No.....

"ORRIN T. WELCH, Mayor.

"Attest: R. H. C. SEARLE, City Clerk."

That after the making, executing, issuing and delivering of each of the said bonds by the said defendant, and before the maturity of the *first* interest coupon thereon, the said defendant proceeded to and did assess and levy a tax upon the taxable property within the corporate limits of the said City of Topeka, defendant herein, as provided by law, for the payment of the first and second interest coupons attached to each of said bonds, at the maturity thereof; that the said taxes, so assessed and levied, were duly collected by the said defendant, and the said *first* interest coupon attached to each of said bonds was, at the maturity thereof, duly paid by the said defendant, out of the said taxes so levied and collected for that purpose, as aforesaid. That the said defendant, without any good reason for so doing, refused to pay the *second* of said coupons, so attached to each of said bonds as aforesaid, at the maturity thereof, notwithstanding the said taxes were collected and the money was then and is now in the hands of the treasurer of Shawnee county, Kansas, for the purpose of paying the said *second* coupon.

That after the payment of the said first interest coupon as aforesaid, and before the maturity of either of the said bonds, and before either of the said *second* or *third* of the said interest

coupons became due and payable, each of the said bonds, with the said *second* and *third* interest coupons attached thereto, were, for *value received*, assigned, transferred and delivered to the plaintiff.

That when each of the said interest coupons herein set out and described became due and payable, the same was duly presented for payment at the place where the same is made payable, and the payment thereof demanded and refused.

That the said interest coupons herein set out and described, there being one hundred and sixty of the same, for thirty-five dollars each, and in all amounting to five thousand six hundred dollars, with interest on two thousand eight hundred dollars thereof, at the rate of seven per cent. per annum since the 15th day of August, A. D. 1873, and with interest on two thousand eight hundred dollars thereof, at the rate of seven per cent. per annum since the 15th day of February, A. D. 1874, remain due and wholly unpaid.

Wherefore, the plaintiff prays judgment against the said defendant for five thousand six hundred dollars, with interest on two thousand eight hundred dollars thereof, at the rate of seven per cent. per annum since the 15th day of August, A. D. 1873, and with interest on two thousand eight hundred dollars thereof, at the rate of seven per cent. per annum since the 15th day of February, A. D. 1874, together with all other proper relief.

ALFRED ENNIS,
Attorney for Plaintiff.

EXHIBIT "A."

State of Kansas, Shawnee County, ss.

Know all men by these presents, that the undersigned have this day voluntarily associated themselves together as a corporation, under the corporate name of "THE KING WROUGHT IRON BRIDGE MANUFACTORY AND IRON WORKS, OF TOPEKA, KANSAS."

The purpose for which this corporation is formed is for the manufacture of bridges and the transaction of such other manufacturing business as the board of directors may determine upon.

The business of the corporation to be transacted at the city of Topeka and State of Kansas.

The term for which this corporation is to exist is 99 years, from the 9th day of July, 1872.

The number of directors shall be seven, and Theodore B. Mills, Byron M. Smith, Isaac T. Lockard, Russell B. Gress, residents of the City of Iola, in the County of Allen, and State of Kansas, Henry E. Norton, a resident of the City of Emporia, in the County of Lyon, and State of Kansas, Jonathan Pickard and Theodore Mills, residents of the City of Topeka, in the County of Shawnee, and State of Kansas, are hereby appointed directors for the first year.

The amount of the capital stock of this corporation is five hundred thousand dollars, divided into five thousand shares of one hundred dollars each.

In witness whereof, we have hereunto set our hands and seals this, the 9th day of July, 1872.

THEODORE B. MILLS, [SEAL.] ISAAC T. LOCKARD, [SEAL.]
BYRON M. SMITH, [SEAL.] JONATHAN PICKARD, [SEAL.]
THEO. MILLS, [SEAL.]

STATE OF KANSAS, } ss.
SHAWNEE COUNTY, }

Before me, Wm. Hall Jenkins, a Notary Public in and for said County and State, personally appeared Theodore B. Mills, Byron M. Smith, Isaac T. Lockard, residents of the City of Iola, in the County of Allen, and State of Kansas, Jonathan Pickard and Theodore Mills, residents of the City of Topeka, County of Shawnee, and State of Kansas, all known to me to be residents as aforesaid, and acknowledged the execution of the foregoing charter of incorporation of "THE KING WROUGHT IRON BRIDGE MANUFACTORY AND IRON WORKS OF TOPEKA, KANSAS," for the purposes and uses therein named, to be their voluntary act and deed.

In witness whereof, I hereunto set my hand and official seal this [SEAL.] ninth day of July, 1872. WM. HALL JENKINS,
Notary Public.

I, W. H. Smallwood, Secretary of State of the State of Kansas, do hereby certify that the above and foregoing is a true and correct copy of the original instrument of writing filed in my office July 10, 1872.

In testimony whereof, I have hereunto subscribed my name and affixed the great seal of the State. Done at Topeka [SEAL] this 10th day of July, A. D. 1872.

W. H. SMALLWOOD,
Secretary of State.

EXHIBIT "B."

UNITED STATES OF AMERICA.

No.....] City Bond. [Twenty years.

One thousand dollars. } CITY OF TOPEKA, Shawnee County, State of Kansas. { State. Ad astra per aspera.

Twenty years after date, the City of Topeka, Shawnee County and State of Kansas, for value received, promises to pay to the King Wrought Iron Bridge Manufactory and Iron Works of Topeka, Kansas, or bearer, the sum of one thousand dollars, with interest from date at seven per cent. per annum, payable semi-annually, on the 15th days of February and August of each year, upon the presentation and surrender, as they severally become due, of the proper coupon therefor hereto attached,

both principal and interest payable at the banking house of Winslow, Lanier & Co., in the City of New York and State of New York.

This bond is issued to aid and encourage the King Wrought Iron Bridge Manufactory and Iron Works, of Topeka, Kansas, in establishing and operating bridge shops in said city of Topeka, under and in pursuance of section seventy-six of an act of the Legislature of the State of Kansas, entitled "An act to incorporate cities of the second class, and to repeal former acts;" approved February 29th, 1872. Also an act of the Legislature of the State of Kansas entitled "An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water power or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith;" approved March 2d, 1872.

In witness whereof, the said city of Topeka has caused this bond to be signed by Orrin T. Welch, Mayor, and attested by R. H. C. Searle, City Clerk, this the 15th day of August, 1874.

ORRIN T. WELCH, Mayor.

R. H. C. SEARLE, City Clerk.

{ Seal of the city of Topeka. }

EXHIBIT "C."

STATE OF KANSAS, ss.

I, A. Thoman, Auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued, that the signatures thereto are genuine, and that the same has been duly registered in my office according to law.

In witness whereof, I hereunto set my hand and affix my seal of office, at the city of Topeka, this 28th day of August, 1872.

{ Seal of the Auditor of the State of Kansas. }

A. THOMAN, Auditor.

To this declaration the defendant in error filed a demurrer, which is as follows:

DEMURRER.

United States of America, District of Kansas, ss.

In the Circuit Court in and for the District of Kansas.

The Citizens Savings and Loan Association, of Cleveland, Ohio, *Plaintiff*,
vs.
The City of Topeka, in the county of Shawnee and State of Kansas, *Defendant*.
} Demurrer.

And now comes the said defendant, by Ross Burns, its attor-

ney, and demurs to the petition of the said plaintiff for the following cause:

1st. That the said petition of the said plaintiff does not state facts sufficient to constitute a cause of action against this defendant and in favor of the said plaintiff.

Wherefore the said defendant, for the cause aforesaid, asks if the said plaintiff shall be permitted to have or maintain in his said action against this defendant. ROSS BURNS,

City Att'y and Att'y for Def't.

DECISION OF THE COURT.

In the above entitled cause was filed the following opinion:

Citizens Savings and Loan Association,
vs.
City of Topeka.

I sustain the demurrer to the petition for the reasons stated in my opinion in the Commercial Bank of Cleveland vs. City of Iola, reported in 2 Dillon, C. C. R.

JOHN F. DILLON, Judge.

ASSIGNMENT OF ERROR.

The plaintiff in error assigns as error the ruling of the Circuit Court in sustaining the demurrer to the declaration.

STIPULATION.

United States of America. In the Circuit Court of the United States in and for the District of Kansas.

The Citizens' Savings and Loan Association, of Cleveland, Ohio,
vs.
The City of Topeka, in the County of Shawnee and State of Kansas.

It is hereby stipulated and agreed by and between the parties to the foregoing entitled action, that the following is a true and correct copy of the Proclamation of the Mayor of the City of Topeka, (defendant in said action,) calling the election for the voting of the bonds to which the interest coupons sued on, in said action, belong, and in pursuance of which the said bonds were issued; that the same was published on the 17th day of July, 1872, in *The Commonwealth*, a daily newspaper of general circulation, published in the said city of Topeka; that said proclamation was published for three consecutive weeks, before the holding of the election therein referred to, in each newspaper published in the said city of Topeka, to-wit: *The Commonwealth*, *The State Record* and *The North Topeka Times*;

that the ordinance set out in said proclamation was passed by the mayor and councilmen of said city of Topeka, and was published and took effect all as in said proclamation set forth:

MAYOR'S PROCLAMATION.

CITY MAYOR'S OFFICE,
CITY OF TOPEKA, KANSAS, July 17, 1872.

WHEREAS, On the 15th day of July, A. D. 1872, the mayor and councilmen of the said city of Topeka did pass the following ordinance, to-wit:

ORDINANCE No. 181.

[Published July 17, 1872.]

An ordinance authorizing the city of Topeka, in the county of Shawnee and state of Kansas, to encourage and aid the King Wrought Iron Bridge Manufactory and Iron Works, of Topeka, Kansas, in permanently establishing, erecting, furnishing with all the necessary machinery, and continuing thereafter for the term of twenty years to operate bridge shops at the said city of Topeka, by donating for such purposes one hundred thousand dollars in the bonds of the said city, to be voted and issued therefor.

Be it ordained by the mayor and councilmen of the city of Topeka:

SECTION 1. That a special election shall be held in the said city of Topeka, Kansas, on the 10th day of August, A. D. 1872, for the purpose of submitting to the qualified voters of said city the question of encouraging and aiding the King Wrought Iron Bridge Manufactory and Iron Works, of Topeka, Kansas, in permanently establishing, erecting, furnishing with all the necessary machinery, and continuing thereafter for the term of twenty years to operate bridge shops at the city of Topeka, by donating for such purpose one hundred thousand dollars in the bonds of the said city of Topeka, to be voted and issued therefor. The said bonds to be issued payable twenty years after the date thereof, bearing interest at the rate of seven per cent per annum, payable semi-annually; both principal and interest payable in the city of New York, in the state of New York, which said bonds shall have interest coupons attached, and shall be issued in denominations of one thousand dollars each, signed by the mayor, attested by the city clerk and sealed with the seal of the said city.

SEC. 2. That said election shall be held at the usual places of voting in the several wards of the said city of Topeka, and the polls shall be kept open from eight o'clock in the forenoon until six o'clock in the afternoon of said day, during which time the qualified voters of said city may cast their ballots on the question of instructing the mayor and councilmen of said city to make said donation and to issue the bonds of the said city therefor, as aforesaid, subject to the conditions hereinafter provided.

SEC. 3. Those voting in favor of the proposition shall have written or printed on their ballots, "For the bridge shops donation and bonds." Those voting against the proposition shall have written or printed on their ballots, "Against the bridge shops donation and bonds."

SEC. 4. None of the said bonds of the said city of Topeka shall be issued and delivered until the said King Wrought Iron Bridge Manufactory and Iron Works, of Topeka, Kansas, shall execute to the said city of Topeka an undertaking in the sum of two hundred thousand dollars, with security, to the approval of the mayor and councilmen of the said city for the faithful performing, completing and carrying into effect the conditions hereinafter stated and to be performed on the part of the said bridge company, or in case such undertaking is not given, then said bonds not to be issued until the said conditions shall first be fully performed and completed, which said conditions are as follows, to-wit:

First. The said King Wrought Iron Bridge Manufactory and Iron Works, of the city of Topeka, Kansas, shall, within ninety days from the date of the voting of the said bonds, or so soon thereafter as the same can, with a reasonable effort, be done, erect, furnish with all the necessary machinery, and have in actual operation, bridge shops within the corporate limits of the said city of Topeka, the said bridge shops to be of four times the capacity of the present bridge shops in the city of Iola, in the state of Kansas, and in accordance with the plans presented and on file in the city clerk's office of the city of Topeka, Kansas, for said shops, and to be permanently established in the said city of Topeka, and the said King Wrought Iron Bridge Manufactory and Iron Works to contract with and obligate itself to the said city of Topeka, with security in the sum of $100,000, to be approved by the mayor and councilmen, to so permanently establish and continue thereafter for the term of twenty years to operate the said bridge shops in the said city of Topeka.

Second. That when the said bridge shops at the said city of Topeka shall be completed and in operation as aforesaid, then the further manufacture of bridges at the said city of Iola to be suspended and to not be again resumed by any of the parties connected with the said King Wrought Iron Bridge Manufactory and Iron Works, of Topeka, Kansas.

Third. Said company shall have a *bona fide* permanent, paid-up capital of five hundred thousand dollars invested in said business.

SEC. 5. That upon the said King Wrought Iron Bridge Manufactory and Iron Works, of Topeka, Kansas, executing and delivering to the said city of Topeka the said undertaking in the sum of two hundred thousand dollars, with security to the approval of the mayor and councilmen of the said city of Topeka

for the faithful performing, completing and carrying into effect the said conditions on the part of the said "King Wrought Iron Bridge Manufactory and Iron Works," to be performed, or, in the event such undertaking is not given, then, upon the performing and completing the said conditions to the satisfaction of the said mayor and councilmen, in either case there shall be issued and delivered to the said King Wrought Iron Bridge Manufactory and Iron Works, as a donation, the bonds of the said city in the sum of one hundred thousand dollars, in sums of one thousand dollars each, with interest coupons attached, and payable in twenty years from the date thereof, with interest at the rate of seven per cent. per annum, payable semi-annually; both principal and interest payable in the city of New York, in the state of New York; said bonds to be signed by the mayor, attested by the city clerk and sealed with the seal of said city; and the said bonds, when so issued and delivered, shall be in full for the said donation proposed to be made to the said King Wrought Iron Bridge Manufactory and Iron Works for the performing and completing the conditions as aforesaid.

SEC. 6. The returns of the said election shall be made and the votes canvassed according to the rules and regulations provided by law for holding elections. The mayor of the said city of Topeka shall issue his proclamation of said election, as provided by law, and such proclamation shall be published as required by law.

SEC. 7. This ordinance shall take effect and be in force from and after its passage and publication once in the *Kansas Daily Commonwealth*.

Approved July 15th, 1872. ORRIN T. WELCH, Mayor.

Passed the council July 15th, 1872.

R. H. C. SEARLE, City Clerk.

AND WHEREAS, The said ordinance was approved by me on the said 15th day of July, A. D. 1872, and was published once in the *Kansas Daily Commonwealth*, on the seventeenth day of July, A. D. 1872:

Now, THEREFORE, I, Orrin T. Welch, mayor of the said city of Topeka, in pursuance of law, do proclaim and make known that a special election will be held in the city of Topeka on the tenth day of August, A. D. 1872, for the purpose of submitting to the qualified voters of the said city the question of encouraging and aiding the King Wrought Iron Bridge Manufactory and Iron Works, of Topeka, Kansas, in permanently establishing, erecting, furnishing with the necessary machinery and continuing thereafter for the term of twenty years to operate bridge shops in the said city of Topeka, by donating to the said King Wrought Iron Bridge Manufactory and Iron Works one hundred

thousand dollars in the bonds of the said city, said bonds to be issued in denominations of one thousand dollars each, with interest coupons attached, and made payable twenty years after the date thereof, with interest at the rate of 7 per cent. per annum, payable semi-annually in the city of New York, and subject to the conditions, restrictions and limitations as provided in the foregoing ordinance. Those voting in favor of the proposition shall have written or printed on their ballots, "For the bridge shops donation and bonds." Those voting against the proposition shall have written or printed on their ballots, "Against the bridge shops donation and bonds." The polls will be open on the said day, in the several wards of the city of Topeka, at the following places, and the persons hereinafter named will act as judges and clerks of said election:

First Ward—At the McMeekin House; judges, H. Burgess, D. M. Adams and Ben. McMeekin; clerks, J. Davis and J. V. Admire.

Second Ward—At the calaboose, on Fifth street, between Kansas avenue and Quincy street; judges, M. Handley, E. E. Strait and J. G. Searle; clerks, S. S. Bragg and J. E. Baldwin.

Third Ward—At W. H. Reed's meat market, No. 298 Kansas avenue; judges, J. C. Chesney, W. W. Phillips and W. H. Reed; clerks, S. H. Woods and T. L. King.

Fourth Ward—At S. Rain & Co.'s livery stable office on Sixth avenue, between Jackson and Van Buren streets; judges, D. H. Horne, A. W. Knowles and J. S. Higgins; clerks, G. F. Merriam and W. S. Jewell.

In testimony whereof, I have hereunto set my hand and caused the seal of the city of Topeka, Kansas, to be affixed, the day and year first above written. ORRIN T. WELCH, Mayor.

Attest: R. H. C. SEARLE, City Clerk.

It is hereby further stipulated and agreed by and between said parties that the said proclamation herein set forth containing the said ordinance be attached to and made a part of the record in said action, and to have the same force and effect as if the same had been set forth in and made a part of the declaration in said action.

This the 16th day of September, 1874.

ALFRED ENNIS,
Attorney for Plaintiff.

ROSS BURNS,
City Attorney of City of Topeka.

ARGUMENT.

The bonds to which the coupons sued on belong were issued under and by virtue of section seventy-six of an act of the Legislature of the State of Kansas, entitled "An act to incorporate cities of the second class, and to repeal former acts," approved February 28th, 1872;* also an act of the Legislature of the State of Kansas entitled "An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water power or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2d, 1872.†

Section seventy-six of the first-named act provides for the issuing of bonds by cities of the second class for the purpose of encouraging the establishment of manufactories, and such other enterprises as may tend to develop and improve such city. Said section reads as follows: "SECTION 76. The council shall have "power to encourage the establishment of manufactories and "such other enterprises as may tend to develop and improve "such city, either by direct appropriation from the general fund "or by the issuance of the bonds of such city in such amounts "as the council may determine: *Provided*, That no greater "amount than one thousand dollars shall be granted for any "one purpose, unless a majority of the votes cast at an election "called for that purpose shall authorize the same. The bonds "thus issued shall be made payable at any time within twenty "years, and bear interest not exceeding ten per cent. per annum: "*And provided, further*, That where the city council has here-"tofore, by ordinance, agreed to appropriate any money, or to "issue any bonds of the city for the purpose of aiding or encour-"aging any such enterprises, the same may be done without "regard to section forty,‡ and as if said vote had been taken."

*Chapter 100, Laws of Kansas 1872, page 215.

†Chapter 68, Laws of Kansas 1872, page 110.

‡Section forty referred to provides that at no time shall all the bonded indebtedness of any city of the second class exceed twenty per cent. of the taxable property within such city.

The last-named act, among other things, provides in *detail* for the calling of elections, and the voting and the issuing of bonds.

It is conceded that these two acts of the Legislature are regular in their enactment, and are in due form.

The validity of these enactments is put in issue by the demurrer to the petition. It is claimed that the Legislature did not possess the power to enact these laws authorizing and empowering cities of the second class to issue bonds which constitute a city debt, to be paid by taxation, to aid and encourage the establishment of manufactories and such other enterprises as may tend to develop and improve such city.

The plaintiff in error insists upon *two* propositions, which may be stated as follows:

First—That the Legislature of the State of Kansas possessed the power to enact the laws referred to, authorizing the issuing of the bonds to which the interest coupons sued on belong.

Second—That the defendant in error is estopped from denying the validity of the laws referred to, or the validity of the bonds to which the interest coupons sued on belong.

These two propositions will be noticed in the order in which they have been stated.

LEGISLATIVE POWER.

Had the Legislature of the State of Kansas the power to enact the laws referred to, authorizing the issuing of the bonds to which the interest coupons sued on belong?

The question is *strictly* one of *legislative power*, and its consideration is of sufficient importance to serve as an apology for an allusion to some of the elementary principles of government.

The British Parliament, *not* subject to the restrictions and limitations of a written constitution, is *omnipotent*. It is the *supreme power* of the realm. Its powers are *undefined* and *undefinable*. "It can do everything that is not naturally impossible." And what it *does*, *no earthly power*, except Parliament, *can undo*. 1 Blackstone's Com., 161; 4 Coke's Inst., 36; 1 De Tocqueville's Democracy in America, (Reeves) 2 Am. Ed., 80; *Eaton vs. B. C. & M. R. R.*, 51 N. H., 504.

If the British Parliament enact a thing to be done, although it be unwise, impolitic and unreasonable, *no power*, other than that of Parliament itself, can restrain its operation. The courts *are not* at liberty to interfere. 1 Blackstone's Com., 91.

While the legislative department of our Federal Government is one of *enumerated* and *limited powers*, wherein Congress can exercise *no* legislative authority unless it is *expressly* delegated by, or *shall be necessary* to carry into effect the enumerated powers of, the Federal constitution, the legislative department of the State governments possesses *all legislative power* not vested in the Federal Government, and *may exercise supreme and omnipotent legislative authority, and may enact any law*, if not forbidden by the State constitution, the constitution of the United States, or the laws and treaties made under it. *The Township of Pine Grove vs. Edward B. Talcott*, U. S. Supreme Court, October term, 1873; *Railroad Company vs. County of Otoe*, 16 Wal., 667; *McCulloch vs. State of Maryland*, 4 Wheaton, 316; *Golden v. Prince*, 3 Wash. C. C., 313; *Beauchamp vs. The State*, 6 Blackf., 299; *The Board of Co. Com. of Leavenworth vs. Miller*, 7 Kansas, 479; *Lafayette, Muncie & Bloomington R. R. Co. vs. Giger*, 34 Ind., 185; *S. & V. R. R. Co. vs. City of Stockton*, 41 Cal., 147; *The Town of Guilford vs. The Supervisors of Chenango County*, 13 N. Y., 145; *The People et. al. vs. Flagg et al.*, 46 N. Y., 407; *The People vs. Draper*, 15 N. Y., 543; *Clark vs. The City of Rochester*, 24 Barb., 446; *Morrison vs. Springer*, 15 Iowa, 304; *Stewart vs. The Board of Supervisors of Polk County*, 13 Iowa, 9.

It may be stated thus: that when the validity of an act of Congress is brought in question, reference is had to the Federal constitution to ascertain if *the power* to enact the same *has been conferred;* while, on the other hand, when the validity of an act of a State legislature is brought in question, reference is had to both the State and Federal constitutions to ascertain if *the power* to enact the same *has been forbidden.*

SECTION 2 of the bill of rights in the constitution of the State of Kansas reads as follows: "All political power is inherent in the people."

SECTION 1 OF ARTICLE 2 of the constitution of the State of Kansas reads as follows: "The legislative power of the State shall be vested in a house of representatives and senate."

SECTION 2 of the bill of rights declares *all* political power to be *inherent* in the people.

SECTION 1 OF ARTICLE 2 of the constitution vests *all* the *legislative power*, inherent in the people, in *a legislature*.

This is *not* a grant of *enumerated* and *limited powers*, as is the case with the consitution of the United States, but is a *general grant of power*, and confers upon the Legislature *supreme and omnipotent legislative authority, subject only to constitutional restrictions and limitations*.

Attention is directed to the following authorities, wherein the foregoing provisions in the constitution of the State of Kansas, and similar provisions in the constitutions of other States, have been construed:

In the case of *The Board of Com. of Leavenwarth vs. Miller*, 7 Kansas, 479, Justice VALENTINE, in delivering the opinion of court, says (see pp. 489-501):

"We suppose that it will be conceded by everybody that the Legislature have *no inherent* power of any kind; that they possess no power except such as is delegated to them by the people. * * * * * *

"As the people have, by the constitution, *clothed the Legislature with all the legislative power of the State*, the first great question is, what is legislative power? This may be answered by saying it is the power to *make laws*."

In the case of *Beauchamp vs. The State*, 6 Blackf. (Ind.) 299, Justice DEWEY, in delivering the opinion of the court, says (see page 302):

"This is *not* a grant of special, limited and enumerated powers, implying a negative of all others, as is the case with the constitution of the United States. The legislative authority of this State *is the right to exercise supreme and sovereign power, subject to no restrictions*, except those imposed by our own constitution, by the Federal constitution, and by the laws and trea-

ties made under it. *This is the power under which the Legislature passes all laws.*"

In the case of *The Lafayette, Muncie & Bloomington R. R. Co. vs. Giger*, 34 Ind., 185, Justice BUSKIRK, in delivering the opinion of the court, says (see page 198):

"When the constitution of a State vests in the General Assembly *all legislative power*, it is to be construed *as* a *general grant of power*, and *as authorizing* such legislature *to pass any law* within the ordinary functions of legislation, if not delegated to the Federal government or prohibited by the State constitution."

In the case of *The People vs. Draper*, 15 N. Y., 532, Chief Justice DENIO, in delivering the opinion of the court says (see page 543):

"The people, in framing the constitution, committed to the legislature the *whole* law-making power of the State, which they did not expressly or impliedly withhold. *Plenary power in the legislature*, for *all* purposes of civil government, *is the rule.* A prohibition to exercise a particular power *is an exception.* In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden."

In the case of *S. & V. R. R. Co. vs. City of Stockton*, 41 Cal., 147, Justice WALLACE, in delivering the opinion of the court, ssay (see page 161):

"The law-making power *is*, in its essence and nature, *the supreme power* in the State, and the Legislature, in its exercise, impersonates the aggregated sovereignty of the people themselves.

"Hence it results that the Legislature is politically *omnipotent*, except in those particulars in which its power has been limited, qualified or absolutely withdrawn by the provisions of the Federal or the State constitutions."

In the case of *Clarke vs. City of Rochester*, 24 Barb., 446, Justice SMITH, in delivering the opinion of the court, says (see page 480):

"At the Revolution all power reverted to the people, and they were at liberty to institute and establish such government as

they deemed best calculated to secure their rights and liberties and most conducive to their safety and happiness. In their original capacity, through delegates to a convention chosen for that purpose, they ordained and established the present form of government, and *vested the supreme legislative power* of the State in two separate bodies of men, one called the ASSEMBLY and the other the SENATE. The *legislative power thus vested* was and is undefined and undetermined in its terms, as it is in its nature undefinable as to its extent. All the original *inherent power* of the people to legislate for themselves, to provide for their general welfare and to promote their common interest and happiness *was conferred upon the legislative department of government thus created.*

"The powers of the Legislature were then and are still as *omnipotent* as those of the British Parliament. * * * * *

"The constitution of the United States and that of our own State constitute the *only* restriction or limitation of the legislative power. It is, *aside* from these limitations, *supreme, uncontrollable and omnipotent* in respect to all other matters and subjects."

In the case of *Grant vs. Courter,* 24 Barb., 232, Justice WRIGHT, in delivering the opinion of the court, says (see page 237):

"The highest exercise of sovereignty, that of law-making, has been delegated to a senate and assembly. Each citizen or member of the government is a party to this delegation of power, insomuch that the people themselves cannot in any other way exercise this right of sovereignty. The people have invested this branch of the government with all the sovereignty they possessed themselves in this respect, with only such limitations on its exercise as they had thought wise to impose in the fundamental law."

In the case of *Clarke vs. City of Rochester,* 24 Barb., 446, Justice SMITH, in delivering the opinion of the court, says (see page 489):

"That all *the inherent* power of the people for self-government

not delegated to the general government is reserved to and belongs to the State."

"That of such reserved powers *the entire legislative power* is vested in the State Legislature, subject to *no restrictions* or *limitations*, except such as are contained in the State Constitution."

In the case of *Luke vs. The City of Brooklyn*, 43 Barb. 54, Justice BROWN, in delivering the opinion of the court, says (see page 57):

"If any rule of legislative authority may be regarded as settled and established in the courts of this State, it is that which declares that the power of the Legislature *is supreme in all respects*, and *unlimited in all matters pertaining to legislation*, except when it is limited and restrained by the fundamental law.

In the case of *The People vs. the New York Gas Light Co.*, 64 Barb. 55, Justice LEONARD, in delivering the opinion of the court, says (see page 70):

"The *power* of the Legislature *is omnipotent* within constitutional limits * * * The good of the greatest number is regarded by the Legislature as its justification for extraordinary use of its power."

In the case of *Wynhamer vs. The People*, 13 N. Y. 378, Justice HUBBARD, in delivering the opinion of the court says (see page 452):

"It is conceded that *all power emanates from the people*, and that the written constitution clothes the Legislature with *all* the powers it possesses. But the grant of power in that instrument *is general of all legislative power of the State*. What this is precisely is not stated, and cannot be well defined. Aside from express limitations, it is believed to embrace all the common law power which the Legislature would have possessed had the fundamental law remained, as in England, a part of the unwritten law of the State."

In the case of *The Bank of Chenango vs. Brown*, 26 N. Y., 467, Justice EMOTT, in delivering the opinion of the court, says (see page 469):

"The Legislature of this State possesses *the whole legislative power* of the people, except so far as they are limited by the

constitution. In a judicial sense, and so far as courts are concerned with its application and construction, their authority is *absolute and unlimited*, except by the express restrictions of the fundamental law."

In the case of *Morrison vs. Springer*, 15 Iowa, 304, Justice WRIGHT, in delivering the opinion of the court, says (see pp. 342–343):

"The Legislature *clearly has the power* to legislate on all rightful subjects of legislation, *unless strictly prohibited* from so doing, or where the prohibition is implied from some express provision. *This theory must never be lost sight of by the courts in examining the powers of the Legislature. It is elementary, cardinal*, and frequently possesses *controlling weight* in determining the constitutional validity of their enactments. The General Assembly *possesses all legislative authority* not delegated to the general government or prohibited by the constitution."

In the case of *Stewart vs. The Board of Supervisors of Polk County*, 30 Iowa, 9, Justice MILLER, in delivering the opinion of the court, says (see page 18):

"The people, then, have vested the legislative authority, *inherent in them*, in the General Assembly. Subsequently in the same instrument they withdraw some portions of this authority, and impose certain restrictions upon the exercise of the authority granted. It follows, therefore, as a logical sequence, that within these limitations and restrictions, *the legislative power* of the General Assembly *is supreme*." See *The People vs. Coelman*, 4 Cal., 46; *People vs. Paduco*, 27 Cal., 175.

In the case of *Golden vs. Prince*, 3 Wash. C. C., 313, Justice WASHINGTON, in delivering the opinion of the court, says (see page 316):

"The State governments, therefore, retained *the right to make such laws as they might think proper*, within the ordinary functions of legislation, if not inconsistent with the powers vested exclusively in the Government of the United States, and not forbidden by some article of the Constitution of the United States, or of the State; and such laws were obligatory upon all the citizens of

that State, as well as others who might claim rights or redress for injuries, under these laws or the courts of that State."

In the case of *Railroad Company vs. County of Otoe*, 16 Wall, 667, Justice STRONG, in delivering the opinion of the court, having under consideration the validity of an enactment of the Legislature of the State of Nebraska, says (see page 673):

"*General legislative power is vested in the Legislature.* None was reserved to the people of the State."

In the case of *The Township of Pine Grove vs. Edward B. Talcott*, decided at the October term, 1873, of the U. S. Supreme Court, and not yet reported, Justice SWAYNE, in delivering the opinion of the court, having under consideration the validity of an enactment of the Legislature of the State of Michigan, says:

"*The legislative power of a State extends to everything* within the sphere of such power, except as it is restricted by the Federal Constitution, or that of the State." See *Bushnell vs. Beloit*, 10 Wis., 195. *People vs. Mitchell*, 35 N. Y., 551. *Evansville, &c. Railroad Co. vs. Evansville*, 15 Ind., 395. *Aurora vs. West*, 9 Ind., 75, and 22 Ind., 88. *V. S. and T. R. W. Co. vs. Parish of Ouachita*, 11 La., An., 649. *City of St. Louis vs. Alexander*, 22 Mo., 439. *Taylor vs. Newbern*, 2 Jones' Eq. (N. C.), 141. *Stein vs. Mayor of Mobile*, 24 Ala., 591. *Whitaker vs. Johnson County*, 10 Iowa, 161. *Fosdick vs. Perrysburg*, 14 Ohio St., 472. *Cotton vs. County Commissioners*, 6 Florida, 610. *Price vs. Foster*, 4 Harrington (Del.), 479. *Piatt vs. The People*, 29 Ill., 474. *Maddox vs. Graham*, 2 Metc., 56. *Flach vs. M. & L. R. R. Co.*, 12 B. Monroe, 1. *Strickland vs. Miss. R. R. Co.*, 21 Miss. 209. *L. & N. R. R. Co. vs. Davidson*, 1 Sneed (Tenn.) 637. *Commonwealth vs. Perkins*, 43 Penn., 400. *Bridgeport vs. The Housatonic R. R. Co.*, 15 Conn., 475. *Commissioners of Knox County vs. Aspinwall*, 21 Howard, 539, and 24 Howard, 376. *Bissell vs. City of Jefferson*, 24 Howard, 287. *Woods vs. Lawrence*, 1 Black, 386. See cases reported in 1 Wallace, on pages 83-175-272, 291-284; 6 Wallace, on pages 166-210-504-508; 7 Wallace, on pages 182, 313. *City vs. Lamson*, 9 Wallace, 477. *People vs. Supervisors of San Francisco*, 27 Cal., 655. *Augusta*

Bank vs. Augusta, 49 Me., 507. *Wyman vs. Macon*, 21 Ga., 275.

If the Legislatures of our States were like the British Parliament, *without* constitutional restrictions and limitations, *their powers would then be supreme and omnipotent*, and any law enacted by them would *be valid*, and *no power* known to the government could interpose to pronounce such enactment invalid.

In COOLEY'S Constitutional Limitations, on pp. 167 and 168, the learned author says:

"The rule of law upon the subject appears to be that, *except* where the constitution has *imposed limits* upon the *legislative power*, it must be considered as *practically absolute*, whether it operate according to natural justice or not in any particular case." See *Walker vs. The City of Cincinnati*, 21 Ohio St., 14.

In the case of *Colder vs. Bull*, 3 Dall., 386, Justice IRDELL, in delivering the opinion of the court, says (see page 398):

"If, then, a government, composed of legislative, executive and judicial departments, were established by a constitution *which imposed no limits* on the *legislative power*, the consequence would inevitably be that whatever the legislative power *chose to enact* would *be lawfully enacted*, and the judicial power could *never interpose to pronounce it void.*"

In the case of *Clarke vs. The City of Rochester*, 24 Barb., 446, Justice SMITH, in delivering the opinion of the court, says (see page 480):

"All the original *inherent* power of the people to legislate for themselves, to provide for their common interest and happiness, was conferred upon the legislative department of government thus created. The powers of the Legislature were then and are still as *omnipotent* as those of the British Parliament, *except* as the people have since delegated portions of their original power to the General Government, and have *restricted* or *limited* the legislature in our State constitution."

In the case of *Twitchell vs. Blodgett*, 13 Mich., 127, Justice CHRISTIANCY, in delivering the opinion of the court says (see pp. 152-153):

"The purpose and object of a State constitution are *not* to make specific grants of legislative power, but to *limit* that power where it would otherwise be general or unlimited. * * * * *

"Without any limitation of the legislative power in our constitution, that power would have been at least as *absolute* and *unlimited* within the borders of the State as that of the Parliament in England, subject only to the constitution of the United States. The simple creation by a State constitution of the legislative power, without any express, specific grant of power, and without any express *limitation*, would have conferred this unlimited power." See 1 Kent's Com., 448; *Sill vs. Village of Corning*, 15 N. Y., 303; *Scott vs. Smarts Ex.*, 1 Mich., 306-307; *Williams vs. Mayor of Detroit*, 2 Mich., 560; *People vs. Gallagher*, 4 Mich., 244; Leiber on Civil Liberty and Self-government, chap. 15, page 825.

It is *not* claimed that there is any constitutional *restriction* or *limitation* upon the legislature of the State of Kansas prohibiting the enactment of the laws under consideration. *No* constitutional provision *has been pointed out* which these laws *infringe or are repugnant to. No such provision exists.*

The judiciary, a co-ordinate branch of the government, possessing *no greater* or *higher powers* than the legislative department, *cannot* declare a legislative enactment invalid for any cause, *except* that such enactment infringe or be repugnant to the State or Federal constitution.

In COOLEY'S Constitutional Limitations, on pp. 168-167, the author says:

"The protection against unwise or oppressive legislation within constitutional bounds *is* by *an appeal to the justice and patriotism of the representatives of the people.* If this fail, the people, in their sovereign capacity, can correct the evil, but *courts cannot* assume their rights.

"The *judiciary* can *only* arrest the execution of a statute *when it conflicts with the constitution. It cannot* run a race of opinions upon points of right, reason and expediency with the law-making power.

"If the courts are not at liberty to declare statutes void,

because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that these principles are placed beyond legislative encroachment by the constitution."

In the case of *State of Kansas, ex rel. Crawford vs. Robinson et al.*, 1 Kansas, 17, Chief Justice EWING, in delivering the opinion of the court, says (see page 27):

"It has been repeatedly held, by the Supreme Court of nearly all the States of the Union, that no statute should be declared unconstitutional, *unless its infringement of the superior law is clear, beyond substantial doubt.* The reason of the rule is that when laws have gone into effect, and been acted upon by the people and by departments of the government, it is generally hurtful to the interest of society to have them expunged by judicial decision."

In the case of *Sears vs. Cottrell*, 5 Mich., 251, Justice MANNING, in delivering the opinion of the court, says (see page 253):

"The *judiciary* is *not* above the laws and the constitution. Its province is to declare what the constitution and the laws are, giving a pre-eminence to the former, and declaring the latter void *only when repugnant to it.*"

In the case of *Brown vs. Buzan*, 24 Ind., 194, Justice FRAZER, in delivering the opinion of the court, says (see page 197):

"The *courts* should *never strike down a statute* unless *its conflict with the constitution is clear.* Then, too, the judiciary ought to accord to the Legislature as much purity of purpose as it would claim for itself, as honest a desire to obey the constitution, and also as high capacity to judge of its meaning; hence, its action is entitled to respect which should beget caution in attempting to set it aside."

In the case of *The Commonwealth vs. McCloskey*, 2 Rawle, 369, Justice ROGERS, in delivering the opinion of the court, says (see page 474):

"If the legislature should pass a law in plain and unequivocal language, within the general scope of their constitutional powers,

I know of no authority in this government to pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to the principles of natural justice; for this would be vesting in the court a *latitudinarian authority*, which might be abused, and would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well-being of society, or at least not in harmony with the structure of our ideas of natural government."

In the case of *Twitchell vs. Blodgett*, 13 Mich., 127, Chief Justice MARTIN, in delivering the opinion of the court, says (see pp. 174–175):

"It is also very well settled that no statute is unconstitutional *merely because it is wrong in policy or principle.* It is not enough that it is contrary to sound public morality, or injurious to private rights. Inconsistency with rules of law or principles of equity will not make it void. Nothing will have that effect but *a direct collision between its provisions and the Constitution.*"

In the case of *Grant vs. Courter*, 24 Barb., 232, Justice WRIGHT, in delivering the opinion of the court, says (see page 236):

"Yet regarding the question as one of expediency merely, serious doubts may well be entertained of the policy and wisdom of a town in a mainly agricultural country, where there is no unusual concentration of wealth, burdening itself, even temporarily, with a debt. * * * * Still, the question of *expediency is not for us to determine.*"

In the case of *Butler's Appeal*, 73 Penn., State, 448, Justice MERCUR, delivering the opinion of the court, says (see page 451):

"We cannot review the wisdom or expediency of legislative enactments. They must violate some prohibition, expressly declared or clearly implied, of the Constitution of this State, or of the United States, before we can pronounce them to be unconstitutional."

In the case of *Tyler vs. The People*, 8 Mich., 320, Justice MANNING, delivering the opinion of the court says (see page 333):

"To warrant us in declaring a statute unconstitutional, we should be able *to lay our finger* on the part of the constitution violated, and that the infraction should be *clear and free from doubt.*" *See Sears vs. Cottrell,* 5 Mich., 251; *Hartford Bridge Co. vs. Union Ferry Co.,* 29 Conn., 210.

In the case of *Twitchell vs. Blodgett,* 13 Mich., 481, Justice COOLEY, in delivering the opinion of the court, says (see page 501):

"It cannot, therefore, be said that the maxims referred to have been entirely disregarded by the legislature in the passage of this act. But as counsel does not claim that, in so far as they have been departed from, the constitution has been violated, we cannot, with propriety, be asked to declare the act void on any such general objection. An unbroken series of decisions in this State has settled the rule of law, that before we can declare an act of the legislature invalid, its provisions must be found to conflict with the constitution." See *Scott vs. Smart's executors,* 1 Mich., 244; *People vs. Gallagher,* 4 Mich., 244; *Sears vs. Cottrell,* 5 Mich., 251; *Tyler vs. People,* 8 Mich., 320; *People vs. Blodgett,* 13 Mich., 127.

In the case of *Inkster vs. Carver, et al.,* 16 Mich., 484, Justice GRAVES, in delivering the opinion of the court, says (see page 488):

"Before the court will declare an act invalid, as opposed to the constitution, *the repugnancy of the law* to the constitution *must be manifest.*"

In the case of *The People vs. Toynbee,* 2 Parker's (N. Y.) Cr. R., 490, Justice SELDEN, in delivering the opinion of the court, says (see pp. 508–509–510–511):

"It is claimed that, irrespective of any positive instructions, the principles of natural equity and justice set bounds to the power of the legislature which are transcended by this law. In explaining this subject speculative opinions in regard to the wisdom of the act or the beneficial results likely to flow from it can *have nothing whatever to do* with a question which depends upon abstract principles of governmental law; principles which cannot be moulded to meet the views or interests of any portion

of the people. It is a question *not* of expediency but of power.

* * * * * * * *

"To determine then the extent of the law-making power, we have only to look *to the provisions of the constitution.* It has and can *have no other limit than such as is there prescribed,* and the doctrine that there exists in the judiciary some *vague, loose and undefined power,* to annul a law because in its judgment it is contrary to *natural equity and justice,* is in conflict with the first principles of government and can never, I think, be maintained." *See Booth vs. Town of Woodbury,* 32 Conn. 118.

In the case of *Clarke vs. The City of Rochester,* 24 Barb., 446, Justice SMITH, in delivering the opinion of the court, says (see page 470):

"We can declare an act of the legislature void *only* when it violates the constitution *clearly, palpably, plainly* and in such manner as to leave no doubt or hesitation on our minds. This rule is very generally asserted in the courts of this country by the judges of the United States and state courts." *See* 6 Cranch, 87; 4 Dallas 14; 3 Serg. & Rawle 178; 12 Wheaton, 270; 10 Conn., 522; 7 Cowen, 550; 13 Pick., 60; 21 Penn., 9; 14 Mass., 345.

In the case of *The People vs. Cowles,* 13 N. Y., 350, Justice JOHNSON, in delivering the opinion of the court, says (see page 360):

"Courts are not responsible that only wise laws shall be made; they have no power given them to judge of the wisdom of the legislature, nor to revise and alter that which has been enacted to be the law."

In the case of *The People vs. The New York Central Railroad Company,* 24 N. Y., 485, Justice ALLEN, in delivering the opinion of the court, says (see page 504):

"As we have seen, a restraint upon or a prohibition of the exercise of the legislative power, will not be implied in any case but must be *clearly* and *distinctly* expressed in the organic law before courts will hold an act of the legislature void as *ultra vires.*"

In the case of *Wynhamer vs. The People,* 13 N. Y., 378 (page 453), Justice HUBBARD, in delivering the opinion of the court, says:

"I am opposed to the judiciary attempting to set bounds to legislative authority, or declaring a statute invalid upon any fanciful theory of higher law or first principles of natural right outside the constitution.

"If the courts may imply limitation, there is no bound to implication except judicial discretion, which must place the courts above the legislature and also the constitution itself. This is hostile to the theory of the government. *The constitution is the only standard* for the courts to determine the question of statutory validity."

In the case of *The People vs. Flagg et al.*, 46 N. Y., Chief Justice CHURCH, in delivering the opinion of the court, says (see page 404):

"All legislative power is conferred upon the senate and assembly, and if an act is within the legitimate exercise of that power it is valid, unless some *restriction* or *limitation* can be found in the constitution itself."

In the case of *Stewart vs. The Supervisors of Polk County*, 30 Iowa 9, Justice MILLER, in delivering the opinion of the court, says (see page 18):

"Thus, it seems clear, by logical deduction and upon the most abundant authority, that this court has *no authority* to annul an act of the legislature unless it is found to be *in clear, palpable, and direct conflict with the written constitution.*"

In the case of *Fletcher vs. Peck*, 6 Cranch, 87, Chief Justice MARSHALL, in delivering the opinion of the court, says (see page 128):

"It is not on *slight implications and vague conjectures* that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the constitution and the law *should be such that the judge feels a clear and strong conviction of their incompatibility with each other. See*, also, *State ex rel. Crawford vs. Robinson*, 1 Kan., 18; *Atchison vs. Bartholomew*, 4 Kan., 124–141; *Board Com. Leavenworth vs. Miller*, Supra; *Legal Tender cases*, 12 Wallace, 531; *Commonwealth vs. Smith*, 4 Birney, Penn., 123; *Freeland vs. Hastings*, 10 Allen, 585; *Oliver vs. Washington Mills*, 11 Allen, 279;

Cheney vs. Hooser, 9 Ben. Monroe, 345; *Maddox vs. Graham*, 2 Metc., 56; *Tyler vs. The People*, 8 Mich., 333; *The People vs. Mahoney*, 13 Mich., 501; *Oliver vs. Keightley, Auditor of Putnam County, et al.*, 24 Ind., page 514; *Talbot vs. Hudson*, 16 Gray, 417; *Wellington, petitioner*, 16 Pick., 95; *Ogden vs. Saunders*, 12 Wheaton, 270; *Dow vs. Norris*, 4 N. H., 16; *Franklin vs. Wood*, 15 Geo., 80; *Foster vs. Essex Bank*, 16 Mass., 245; *Newland vs. Marsh*, 19 Ill., 381; *Hartford Bridge Co. vs. Union Ferry Co.*, 29 Conn., 227; *Eason vs. State*, 6 Eng., 481; *Matter of Clinton street*, 2 Brews., Penn., 599; *Leonard vs. Wiseman*, 31 Md., 201; *Bennett vs. Bogg*, Baldwin, 74, 75; *Kirby vs. Shaw*, 7 Harris, Penn., 258; *State vs. Dawson*, 3 Hill, 100; *James vs. Patton*, 2 Selden, 9; *McCulloch vs. Maryland*, 4 Wheat, 316; *Clarke vs. People*, 26 Wend., 599; *The Sun Mutual Insurance Co. vs. City of New York*, 5 Sandford, 10; *Land et al., vs. Dorman, et ux.*, 3 Scam., 238; *State vs. Springfield Township*, 6 Ind., 84; *Fletcher vs. Peck*, 6 Cranch, 128; *People vs. Supervisors of Orange*, 17, N. Y., 241.'

The *judiciary cannot* declare a legislative enactment invalid because such enactment is thought to infringe or be repugnant to some *latent spirit supposed to pervade or underlie* the constitution, but which is not clearly disclosed. Such would be invoking the aid of a higher power than the constitution itself.

In COOLEY'S Constitutional Limitations, on pages 171 and 172, the author says: "Nor are the courts at liberty to declare an act void because in their opinion it is opposed to a *spirit* supposed to pervade the constitution, but *not expressed in words*.

"The accepted theory upon this subject appears to be this: In every sovereign State there resides an *absolute and uncontrolled power of legislation*."

In the case of *Walker vs. The City of Cincinnati*, 21st Ohio, St., 14, Justice SCOTT, in delivering the opinion of the court, says (see page 41):

"Let us then first inquire under what conditions it becomes competent for the judiciary to declare an attempted act of legis-

lation formally enacted by the General Assembly to be invalid by reason of unconstitutionality.

"Courts cannot, in our judgment, nullify an act of legislation on the vague ground that they think it opposed to a general *latent spirit* supposed to pervade or underlie the constitution, but which neither its terms nor its implications clearly disclose in any of its parts.

"To do so would be to aggregate the power of making the constitution what the court may think it ought to be instead of simply declaring what it is.

"The exercise of such power would make the court sovereign over both constitution and people and convert the government into a judicial despotism."

In the case of *S. & V. R. R. Co. vs. City of Stockton*, 41 Cal., 147, Justice WALLACE, in delivering the opinion of the court, says (see page 162):

"It will *not do* to talk about the '*spirit* of the constitution' as imposing a limitation upon the legislative power. The limitation ought to be something *definite in itself*; as definite as a sum to be subtracted from a larger one, in order to ascertain a balance.

"The '*spirit* of the constitution' as an interdiction upon legislative power was repudiated by this court in *Patterson vs. Board of Supervisors of Yuba County*, 13 Cal., 182, in which Mr. Justice DANIELS, of the Supreme Court of the United States, is reported as having said that 'if judges were to adopt the notion that a law might be declared unconstitutional because of its supposed repugnance to the *spirit* of the constitution, they ought *to employ a rapping medium* to procure authentic revelations from *that spirit*.' The '*spirit* of the constitution' as a means to ascertain the powers of other departments, would partake too much of the *personal spirit* of the individual judges chosen for the time being to interpret that instrument, and, chamelion like, it would be apt to prove *white*, or *gray*, or *red*, or *bluish*, or *bottle-green*, as the peculiar views of those having the '*spirit*' in their keeping might give it color."

Legislative enactments are presumed to be valid until the contrary *clearly appears.* That before the judiciary can interpose to pronounce a legislative enactment invalid it must be able to *point out the particular clause* in the constitution that such enactment infringes or is repugnant to; and the conflict between such enactment and the constitution must be *free from doubt.*

In COOLEY'S Constitutional Limitations, pages 182–183, the author says:

"It has been said by an eminent jurist, that when courts are called upon to pronounce the validity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with *great caution,* examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and *never declare a statute void,* unless the nullity and invalidity of the act are placed, in their judgment, *beyond reasonable doubt.* A reasonable doubt must be solved *in favor of the legislative action,* and the act be sustained. * * * * The constitutionality of a law, then, *is to be presumed,* because the legislature, which was *first required to pass upon the question,* acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the constitution, upon their action, *have adjuged that it is so.*"

In the case of *Sears vs. Cottrell,* 5 Mich., 257. Justice CHRISTIANCY, in delivering the opinion of the court, says (see page 259):

"No rule of construction is better settled in this country, both upon principle and authority, than the acts of a legislature are *to be presumed* constitutional until the contrary is shown, and it is *only when they manifestly infringe some provision of the constitution, that they can be declared void for that reason*—in cases of doubt, *every possible presumption,* not clearly inconsistent with the language and subject matter, is to be made in favor of the constitutionality of the act."

In the case of *Twitchell vs. Blodgett,* 13 Mich, 127, Justice COOLEY, in delivering the opinion of the court, says, (see page 259):

"It is conceded to be a settled doctrine in this state, that every enactment of the state legislature *is presumed to be constitutional and valid*, and that before we can pronounce it otherwise, *we must be able to point out the precise clause in the constitution* which it violates, and that conflict between the two *must be clear or free from doubt* since it is *only from constitutional provisions*, limiting the legislative will, that we derive authority, to declare void any legislative enactment."

In the case of *Twitchell vs. Blodgett*, 13 Mich., 127, Justice CHRISTIANCY, in delivering the opinion of the court, says (see pp. 150–151):

"No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a state legislature are to be presumed constitutional until the contrary is shown; and it is only when they manifestly infringe some provisions of the constitution that they can be declared void for that reason. In case of doubt, every presumption, not clearly inconsistent with the language or subject matter, is to be made in favor of the constitutionality of the act. The power of declaring laws unconstitutional should be exercised with *extreme caution*, and never where serious doubt exists as to the conflict."

In the case of *Wellington, et al., petitioners, etc.*, 16 Pick., 87, Chief Justice SHAW, in delivering the opinion of the court, says (see page 95):

"The courts should never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt." *See* Devar on Statutes, 690; 2 Rol., 126; 11 Coke, 73.

In the case of *Hartford Bridge Company vs. Union Ferry Company*, 29 Conn., 210, Justice ELLSWORTH, in delivering the opinion of the court, says (see page 227):

"It is, however, a well settled principle of judicial construction, that before an act of the legislature ought to be declared unconstitutional, its repugnance to the provisions or necessary implications of the constitution should be manifest and free from *all reasonable doubt*. If its character in this regard be

questionable, then comity and a proper respect for a co-ordinate branch of the government should determine the matter in favor of the action of the latter."

In the case of *Sharpless vs. Phila.*, 21 Penn., St., 147, Chief Justice BLACK, in delivering the opinion of the court, says:

"An act that rests in the *discretion* of the legislature will be declared void *only when it violates the constitution clearly, plainly, and in such manner as to leave no doubt or hesitation on our minds.*"

In the case of *The State vs. Cooper*, 5 Blackf., 268, Justice BLACKFORD, in delivering the opinion of the court, says (see page 259):

"In questions of this kind, *it is our duty* to decide in favor of *the validity* of the statute, unless *its unconstitutionality is so obvious as to admit of no doubt.*" To the same effect see *Beauchamp vs. The State*, 6 Blackf., 399; *Maize vs. The State*, 4 Ind., 342; *Doe vs. Douglass*, 8 Blackf., 10; *Brown vs. Buzan*, 24 Ind., 194; *The Lafayette, Muncie & Bloomington R. R. Co. et al. vs. Giger*, 34 Ind., 185.

In the case of *Speer vs. School Directors, etc.*, 50 Penn., 150, Justice AGNEW, in delivering the opinion of the court, says (see pp. 157–158):

"The *presumption* is always in favor of the constitutionality of a law. The party who wishes us to pronounce a law unconstitutional takes upon himself the burthen of proving beyond all doubt that it is so." *See Erie & Northeast Railroad Co. vs. Casey*, 2 Casey, 300; *Fletcher vs. Peck*, 6 Cranch, 87; *Cutts Johnson et al. vs. Hardee*, 38 Ga., 350; *Rich vs. Flanders*, 39 N. H., 304; *Mayor, etc., of Baltimore vs. State ex rel. Board of Police, etc.*, 15 Md., 376; *Regents of the University of Maryland*, 9 Gill & Johnson, 383.

In the case of *S. & V. R. R. Co. vs. City of Stockton*, 41 Cal., 147, Justice WALLACE, in delivering the opinion of the court, says (see page 162):

"Hence when we are called upon to declare that there was no authority for the legislature to enact a particular statute, *it is neces-*

sary that we be *pointed to the clause or clauses* of one or the other, or both of these constitutions—state or federal—supposed to have taken away the power entirely or limited it to something else than the subject to which the legislature has applied it."

In the case of *The Township of Pine Grove vs. Edward B. Talcott*, decided at the October term, 1873, of the United States Supreme Court—and not yet reported—Justice SWAYNE, in delivering the opinion of the court, having under consideration the validity of an enactment of the legislature of the State of Michigan, says:

"It is an axiom in American jurisprudence that a statute is *not* to be pronounced void upon this ground, unless *the repugnancy to the constitution be clear*, and *the conclusion* that it exists *inevitable*—every doubt is to be resolved in support of the enactment. The particular *clause* of the constitution *must be specified*, and the act admit of no reasonable construction in harmony with its meaning. The judicial function involving such a result is one of delicacy, and to be exercised always with caution."

It is claimed that the enactments under consideration authorize the raising of a tax for a *private* as distinguished from a *public benefit, use or purpose*; hence the judiciary should interpose and restrain their operation.

It is *not* the province of the judiciary in passing upon the question of the validity of legislative enactments authorizing the raising of a tax to inquire whether such enactments authorize the raising of such tax for a *private* or *public* benefit, use or purpose, or whether the same be expedient, wise or politic. These are questions of political economy—questions for *legislative* and *not judicial* determination.

When the Legislature determines that a thing is of such *public benefit* and so far subserves the *public interest* that it may be aided by taxation, such determination *is conclusive* and cannot be inquired into by the judiciary.

In COOLEY'S "Constitutional Limitations," on page 128, the author says: "The Legislature is to make laws for the public good, and not for the benefit of individuals. It has control of

the public moneys, and should provide for disbursing them only for public purposes. Taxes should only be levied for those purposes which properly constitute a public burden. *But what is for the public good, and what are public purposes, and what does properly constitute a public burden,* ARE QUESTIONS WHICH THE LEGISLATURE MUST DECIDE UPON ITS OWN JUDGMENT, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive; and where, under pretense of lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is unlawful in its character, the courts can enforce only those limitations which the constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives." And on page 487 Mr. COOLEY further says:

"In the first place, taxation having for its only legitimate object the raising of money for *public* purposes and the proper needs or government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized. In this place, however, we do not use the word *public* in any narrow and restricted sense, nor do we mean to be understood that whenever the legislature shall overstep the legitimate bounds of their authority, the case will be such that the courts can interfere to arrest their action. There are many cases of unconstitutional action by the representatives of the people which can be reached only through the *ballot-box;* and there are other cases where the line of distinction between that which is allowable and that which is not, is so faint and shadowy that the decision of the legislature *must be accepted as final,* even though the judicial opinion might be different. * * * It must always be conceded that the proper authority to determine what should and what should not properly constitute a public burden is the legislative department of the State."

In the case of *The Board of Commissioners of Leavenworth vs. Miller—Supra,* 7 Kansas, 479, Justice VALENTINE, while

considering the question of what was for a *public* or *private* purpose, says (see page 536):

"As to what is such a *public* benefit that it may be aided by the public, seems to be a question of public policy—of political economy—which must almost *exclusively* be determined by the *Legislature*. And when the legislature have determined the question—When they have determined that a certain thing is of such great public benefit that it is public policy to aid it by taxation—if the courts may still say that such is not public policy, and for that reason declare the act of the legislature unconstitutional, the courts must possess almost despotic power. If such is correct doctrine, then there is an appeal from the legislature to the courts on mere questions of policy." See *City of Bridgeport vs. The Housatonic R. R. Co.*, 13 Conn., 475. *Blair vs. Ridgely et al.*, 41, Mo., 63. See *Bushnell vs. Beloit*, 10 Wis., 195.

In the case of *The Pennsylvania R. R. Co. vs. Riblet*, 66 Penn., St., 164, Justice SHARSWOOD, in delivering the opinion of the court, says (see page 169):

"We *cannot* try the constitutionality of a legislative act by the motives and designs of the lawmakers, however plainly expressed. If the act itself is within the scope of their authority, it must stand, and we are bound to make it stand if it will upon any intendment."

In the case of *Sharpless vs. Mayor of Philadelphia*, 21 Penn., St., 147, Chief Justice BLACK, in delivering the opinion of the court, says (see pages 171–172):

"It is the interest of the city which determines the right to tax her people for the road. That interest does not necessarily depend on the mere location of the road. * * * * But it is not our business to determine what amount of interest Philadelphia has in either of these improvements. *That has been settled by her officers and by the legislature.* For us it is enough to know that the city *may have* a public interest in them, and that there is not a palpable and clear absence of all possible interest perceptible by every mind at the first blush."

In the case of *Goodin vs. Crump*, 8 Leigh., 120, the court says:

"If, then, the test of the corporate character of the act is the probable benefit of it to the community within the corporation, who is the proper judge whether a proposed measure is likely to conduce to the public interest of the city? Is it this court, whose avocations little fit it for such inquiries? Or is it the mass of the people themselves—the majority of the corporation acting under the sanction of the legislative body? The latter assuredly. This case is approved in the case of *C. W. & Z. R. vs. Commry*, 1 Ohio, 77.

In the case of *Clarke vs. City of Rochester*, 24 Barb., 446, the court hold that the legislature is the exclusive judge in respect to what works are for the public benefit, as well as the expediency of constructing such works. This case was taken to the Court of Appeals, where it was affirmed. See 28 New York, 605. See *Hines vs. City of Leavenworth*, 3 Kansas, 186.

In the case of *Broadhead vs. The City of Milwaukee*, 19 Wis., 624, Chief Justice DIXON, in delivering the opinion of the court, says (see page 686):

"To justify the court in arresting the proceedings and declaring the tax void, the absence of *all possible public interest in the purposes* for which funds are raised must be *clear* and *palpable*; so *clear* and *palpable* as to be perceptible by every mind at *first blush*." See *Schenley vs. City of Allegheny*, 25 Penn., 130.

In the case of *Booth vs. The Town of Woodbury*, 32 Conn., 118, Justice BUTLER, in delivering the opinion of the court, says (see page 128):

"In the first place, if it be conceded that it is not competent for the legislative power to make a gift of the common property or of a sum of money to be raised by taxation where no possible benefit, direct or indirect, can be derived therefrom, such exercise of the legislative power *must be of an extraordinary character* to justify the interference of the judiciary, and this is not that case.

"If there be the *least possibility that making the gift* will be promotive, *in any degree*, of the *public welfare*, it becomes a ques-

tion of *policy* and not of natural justice, *and the determination of the legislature is conclusive.*"

In the case of *Clarke vs. The City of Rochester*, 24 Barb., 446, Justice SMITH, in delivering the opinion of the court, says (see page 483):

"*No power exists* under the constitution to *review* the decision of the legislature, *except* the power of the people to *change their legislators.*

"Certainly the judiciary *has no power to review* the decision of the legislature upon such questions. To do so would be to assume the rights of a *council of revision*; would make the judiciary a sort of despotic power in the State to determine what laws the people should not make; would make it a power odious and unendurable."

In the case of *Wilson vs. The Blackbird Creek Marsh Company*, 2 Peters, 245, Chief Justice MARSHALL, in delivering the opinion of the court, while referring to what may be of benefit to a particular locality and what may tend to increase the value of the property in such locality, says (see page 251):

"Measures calculated to produce such benefits to the public, though *effected through the medium of a private incorporation*, are undoubtedly *within the powers* reserved to the states."

In the case of *The Township of Pine Grove vs. Edward B. Talcott*, Justice SWAYNE, in delivering the opinion of the court, says (case decided at October term of the U. S. Supreme Court, 1873—not yet reported):

"But upon other grounds, we think the public character of such works (railroads) cannot be doubted. *Where they go they animate the sources of prosperity, and minister to the growth of the cities and towns within the sphere of their influence.* Unless *prohibited* from doing so, a municipal corporation *has the same power* to aid in their construction as to procure water for its water works, coal for its gas works, or gravel for its streets, from beyond its territorial limits. (Meyer *vs.* Muscatine, 1 Wall., 389.) Under the limited powers conferred by the federal constitution, Congress has frequently given aid in such cases. The Pacific railroads and Louisville canal furnish in-

stances of such action by that body. The *gift* to the sufferers from the overflow of the Mississippi, and prior acts of the kind, must be borne in mind. *Cannot* a state legislature *do the same things?*

"It *does not* belong to courts to interpolate constitutional restrictions. Our duty is to apply the law, not to make it. All power may be abused where no safeguards are provided. The *remedy in such cases lies with the people*, and *not* with the judiciary.

"We pass by without remark, the point whether in cases like this, the *public* or *private* character of the work is not a *legislative* rather than a *judicial question.*"

The *taxing power* belongs *exclusively* to the *legislative department* of the state government. The legislature of the state possess the *exclusive power* to determine for what purposes taxes may be levied and collected, and as to whether or not *a public interest* or a *public benefit, use or purpose* is to be subserved or promoted by the imposing of such tax, and such determination authorizing such tax *is conclusive*; that when the legislature declares a particular enterprise or object to be public, the judiciary *will so regard it.*

There is a marked distinction between *taxation* and *eminent domain.* Taxation exacts money as the individual's share of a justly imposed and *definitely ascertained* general public burthen, for which an equivalent is presumedly received in the benefits resulting therefrom; while property taken by right of eminent domain is so taken, *not* as the individual's share of an *ascertained* general public burthen, but as something distinct from, and more than, such share of the public burthens. The right of eminent domain does not grow out of the right of taxation. The constitutional provisions to the effect that private property shall not be taken for public use without just compensation has no application or reference to the taxing power.

In the case of the *Providence Bank vs. Billings*, 4 Peters, 514, Chief Justice MARSHALL, in delivering the opinion of the court, says (see page 563—construing act of Rhode Island Legislature):

"The *power of legislation* (state legislation) and consequently of *taxation*, operates on all the persons and property belonging to the body politic. This is an original principal which has its foundation in society itself. It is granted by all for the benefit of all. It *resides* in government as part of *itself*, and need not be reserved when property of any description or the right to use it in any manner is granted to individuals or corporate bodies.

"This vital power may be abused. * * * * The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the *only* security where there is no express contract against unjust and excessive taxation as well as against unwise legislation generally."

In the case of *S. & V. R. R. Co. vs. City of Stockton*, 41 Cal., 147, Justice WALLACE, in delivering the opinion of the court, says (see pp. 158–169–170–179–176–178):

"*Public use*, *public purpose* and *public policy* are much the same import. *Public policy*, the policy upon which governmental affairs are conducted for the time being, is legislative policy in the main, and *public use* and *public purpose* are largely dependent upon this *policy*, notoriously varying in our country from time to time with the accession to power of political parties, differing from each other as to the system of measures best adapted to promote the interest of the state. The resolve of a legislative body, by which a tax is imposed or private property taken, is, therefore, necessarily a legislative determination that a public use is to be promoted by the tax or the taking directed, and such a determination is the determination of a merely political question by the political department of the government.

* * * * * * *

"If we could review the legislative determination upon that point at all, a question would necessarily arise as to the extent to which that review could be carried here. * * * * * *

"The legislative judgment may have discovered a *public use* and a *public benefit* in the encouragement of a particular class of improvements in the state. It *may* be a *public use* in the building a *bridge*, a *road* or a *mill*, and may, in that view, aid its construction *by giving the public funds towards that end.* We

may be ourselves *unable to see* why the particular work thus selected for government aid should be preferred to another work of equal, or, perhaps, in our judgment, of even greater public importance, but which has, nevertheless, been wholly overlooked; but we *cannot*, upon such a view, *forbid* the government aid to the work selected any more than we could direct a similar bounty to the work, in our judgment unreasonably omitted.

"Again: who has come to *deny* the validity of the legislative appropriation by which thousands of dollars have been and are being annually paid to General Sutter for his *private profit* (by way of a pension), as the respondent's counsel would express it.

* * * * * * *

"We have mentioned the pension to Sutter, and the aid to the overland emigration of 1864, because they are prominent, but at the same time not exceptional instances of the exercise of legislative authority in the general history of the state government under its present constitution. Many other and similar instances may be mentioned. Premiums, payable out of the *public moneys*, have been habitually offered for the encouragement of mere *private industry*. The production of sugar from sorghum, the manufacture of molasses, the production of flax, hemp, cotton, tobacco, hops, raw silk, and the manufacture and production of various other articles by *private parties* and for *private profit*, were stimulated by the offer of large sums from the public treasury, by the act for the encouragement of agriculture and manufactures in California (acts 1862, page 145). This policy is further maintained by the act of April, 1866 (page 660), for the encouragement of silk culture in California, by which premiums are offered by the state for the growing of mulberry trees and production of silk cocoons, and the constitutionality of the act was *not even questioned* here, in *The Attorney General vs. The State Board of Judges*, 38 Cal., R. 291, but the statute was subsequently re-enacted in 1868 (page 699); and an examination of the legislative acts will disclose other like instances of the expenditure of the public moneys, the validity of which *no one has undertaken to call in question*. In view of this public history, it cannot surely be claimed in any quarter that legislative au-

thority to expend public moneys in the state was ever understood to be confined to *merely* keeping the government in motion.

"It has, indeed, *habitually* and *notoriously* overstepped that limit to find *uses of a public* character to be fostered by the expenditure of *public* moneys, and having done so, *it is the legislature* which *must* determine whether or not the *public interests* are concerned in promoting any particular aim or object to a sufficient degree to justify the expenditure. This makes up legislative *policy*, for it is legislative *policy* which *selects the objects* to be aided, and *determines the extent* to which that aid should be carried. * * * * This legislative determination *is conclusive upon this court.*"

At an early date the Legislature of the State of Tennessee enacted a law declaring "grist-mills" *public mills.* See Tennessee statute of 1777, chap. 23. Under this statute, in 1832, *Goodlett* applied to condemn the lands of *Harding*, for the purpose of erecting a grist-mill, etc., thereon. The validity of this act of the legislature declaring grist mills *public* mills was brought in question and the act held to be valid. Justice GREEN, in delivering the opinion of the court, says (see 3 Yerg., pp. 53–55):

"The grist-mill is a *public mill*, the miller is a public servant. He is allowed a compensation for grinding, etc. * * * It will appear from what has been said that when an acre of land is taken from any citizen for the purpose of erecting a grist-mill, though the title be vested in another citizen, yet that vestiture is for a *public use*, and is wholly different from the case of taking property from one man and giving it to another for his private benefit only."

The legislature posesses the *exclusive power* to designate the *public purpose* to which the right of eminent domain *may be applied. See Harding vs. Goodlett*, 3 Yerg, 41; *S. P. Stark vs. McGowen*, 1 N. & M., 387; *Lindsly vs. Commissioners*, 2 Bay., 38; *Tipton vs. Miller*, 3 Yerg., 423.

In the case of *The Town of Guilford vs. The Supervisors of Chenango County*, 13 N. Y., 143, in construing the constitutionality of an act of the legislature of 1852, the purpose of which

had been voted down by the town of Guilford (claim not recoverable against the town), Justice DEAN, in delivering the opinion of the court, says (see page 145):

"Has the legislature any power to enact such a law—that is, a law taxing the taxable property of a town to pay a claim of a *private individual*?"

"The general government is one of derivative and limited powers, and as a consequence congress, the legislative branch of that government, can only exercise those prerogatives which are by the constitution conferred upon it.

"But our state government is an independent existence, representing the sovereignty of the people. The *power* of the legislature is the *power* of that sovereignty, and is *supreme* in *all* respects and *unlimited in all matters pertaining to legitimate legislation*, except in those instances where the people have in their fundamental law *limited* or *restricted* it. *Taxation is indisputably a legislative power.* The constitution of this state will be searched in vain for any clause which contains any restriction or limits on the taxing power of the legislature."

Justice DENIO, in delivering an opinion in the same case, says (see page 146):

"Taxation is indisputably a legislative power. The constitution of this state will be searched in vain for any clause which contains any restrictions or limitations on the *taxing power* of the legislature. (Here reference is made to several provisions of the constitution, when the court proceeds.)

"These, it will be seen, are not limitations of the absolute power of the legislature over the public moneys, or of the like power in the imposition of taxes, but rules prescribing the manner of its exercises. Whenever these formalities are observed, the legislature has the right to appropriate the public moneys for local private purposes and to impose a tax upon the property of the whole state or any portion of the state or any particular and specified kind of property." See the recent case of *A. L. Clark, Administrator, vs. James S. Ray, etc.*, in Supreme Court of Louisiana, 1 Central Law Journal, 454; *People, etc., vs. Mayor of Brooklyn*, 4 Comstock, N. Y., 419.

In the case of *Clarke vs. The City of Rochester*, 24 Barb., 446, Justice SMITH, in delivering the opinion of the court, says (see pp. 481–489):

"That the taxing power belongs to the legislature, and is subject to *no limits* or *restrictions* outside of the United States and state constitutions.

"That the legislature is the *exclusive judge* in respect to what works are for the *public benefit* and in regard to the *expediency* of constructing such works, and as to the mode of their construction, whether by the state or by *private* or *municipal corporations* in whole or in part.

"The *taxing power* is one of the *inherent powers* of government and belongs appropriately to the legislative department. See 4 Wheat, 428; 4 Peters, 514–561–563; 2 Comst., 29–419; 3 Kernan, 144. Within the limits of legitimate taxation the legislative discretion is utterly uncontrolable as it is indefinable in its *objects, uses, purposes and extent.*"

In the case of *Thomas vs. Leland*, 24 Wend., 65, Justice COWEN, in delivering the opinion of the court, says (see page 68):

(An act having been passed in 1835, directing the sum of $41,000, to be assessed as a tax upon the property owners of Utica, that sum being required to pay the increased expense caused by the changing of the Chenango Canal which citizens of Utica had given a bond to pay, under act of April, 1834. The act of 1834 authorized the change of the canal upon satisfactory security being given for the payment into the state treasury of the estimated increased expense caused by the change from Whitesborough to Utica).

"The general purpose of raising the money by tax was to construct a canal, a public highway, which the legislature *believed* would be a *benefit to the City of Utica* as such; and independently of the bond, the case is the ordinary one of local taxation to make an improvement. But it is said that if the act had in view the construction of the canal then it was unconstitutional, as seeking to take private property for public use without just compensation.

"To sustain this argument it must be denied that the general profit of the community to which we belong will warrant a tax affecting our prosperity. Our answer is, that the *improvement in question* was in itself, *a compensation* to the plaintiff. Such *was the view taken by the legislature*, and they must be left to *judge* of the compensation. I admit that this power of taxation may be abused, but its exercise cannot be *judicially restrained* so long as it is referable to the taxing power."

In the case of *Railroad Co. vs. Otoe County*, 16 Wall., 667, Justice STRONG, in delivering the opinion of the court, says (see page 675):

"No one questions that in the *absence* of some constitutional *inhibition* the power of a state to appropriate its money, however, raised, is *limited only* by the sense of justice and by the *sound discretion* of its legislature. If the power to tax be unrestricted the power to appropriate the taxes is necessarily so. Accordingly nothing has been more common in the state and federal governments, than appropriations of public money raised by taxation to objects, in regard to which no legal liability has existed. State legislatures have made donations to numerous purposes, wherever, in their judgment, the public well-being required them, and the right to make such gifts has never been seriously questioned. As has been said, the security against abuse of power by a legislature in this direction is found in the wisdom and sense of propriety of its members, and in their responsibility to their constituents."

In the case of *The Mayor of Wetumpka vs. Winter*, 29 Ala., 651, Justice STONE, in delivering the opinion of the court, says (see page 66):

"We have recently had occasion to consider the powers of municipal authority. *See ex-parte Burnett* at this term. In that case we held that the legislature *might* confer on a municipal corporation *larger powers* than would be implied from the general purposes of their creation."

In the case of *Booth vs. The Town of Woodbury*, 32 Conn., 118, Justice BUTLER, delivering the opinion of the court, says see page (130):

"Exacting money by taxation and taking private property for public use are *different things*. Both, it is true, are in one sense the exercise of a right to take the property of individuals for public use, but there is a broad distinction between them. *Taxation* exacts money from individuals as their share of a justly imposed and apportioned general public burthen, and the equivalent is presumptively received in the benefits conferred by the government. Property taken for public use from one or more individuals only, by right of eminent domain is taken, *not* as his or their share of an apportioned public burthen, but as something distinct from and more than his or their share of the public burthens, and therefore the justice and necessity of a constitutional provision for compensation." See *The People vs. The Mayor, etc., of Brooklyn*, 4 Comstock, 419.

The section of the constitution providing that private property shall not be taken for public use without just compensation has reference exclusively to eminent domain and has *no* application or reference *to the taxing power* of the legislature. The legislature is the sole judge of the necessity or expediency of exercising the right of eminent domain. *See The Town of Guilford vs. Cornell et al.* 18 Barb., 615; *Chicago R. I., & P. R. R. vs. Town of Lake*, Chicago *Legal News*, July 4, 1874; *Chambers vs. Satterlee*, 40 Cal., 497; *Nichols vs. The City of Bridgeport*, 23 Conn., 189; *Wynehamer vs. The People*, 13 N. Y., 378; *Booth vs. Town of Woodbury*, 32 Conn., 118; *Grant vs. Courter*, 23 Barb., 232; *The Township of Pine Grove vs. Edward B. Talcott*, U. S. Supreme Court, October term, 1873.

The legislature of a state may, by enactment, grant or authorize the granting of aid to a *private* corporation or a *private* person in the prosecution of a particular undertaking or business, *by exempting* the property of such corporation or person from taxation, thus withdrawing from taxation, and from sharing in the public burthens, a portion of the taxable property, thereby increasing the rate of taxation upon the remaining property, which, in effect, is the same as granting aid by increased taxation upon *all* property for that particular purpose.

In the case of *Jefferson Branch Bank vs. Skelly*, 1 Black.,

(U. S.) 436, Justice WAYNE, in delivering the opinion of the court, says (see page 448):

"We are aware that the very stringent rule of construction of this court, in respect to taxation by a state, has not been satisfactory to all persons. * * * * This court's view of that clause of the constitution, in its application to the states, is now and ever has been, that the state legislatures, *unless prohibited in terms* by state constitutions, *may* contract by legislation *to release* the exercise of taxing a particular thing—corporation or person—as that may appear in its act, and that the contrary has *not been open to inquiry* or argument in the Supreme Court of the United States." See *Tomlinson vs. Branch*, 15 Wallace, 460; *The Peope ex rel. vs. Commissioners of Taxes of New York*, 47 N. Y., 501.

In the case of *Humphreys vs. Peques*, 16 Wall, 244, Justice HUNT, in delivering the opinion of the court says (see page 249):

"Another question is raised, to-wit: That a legislature *does not* possess the power to grant to a *corporation* a perpetual immunity from taxation. It is said that the power of taxation is among the highest powers of a sovereign state; that its exercise is a political necessity without which the state must cease to exist, and that it is not competent for one legislature, by binding its successors, to compass the death of the state. It is *too late* to raise this question in this court. It has been held that the legislature *has the power* to bind the state in relinquishing its power to tax a corporation. * * * * These doctines have been reiterated and reaffirmed so recently as the year 1871. * * * * They must be considered as settled in this court." *See Wilmington Railroad vs. Reid, Sheriff*, 13 Wall, 264; *Jefferson Bank vs. Skelly*, 1 Black, 436; *Providence Bank vs. Billings*, 4 Peters, 514; *Dartmouth College vs. Woodward*, 4 Wheat., 518; *The Birmhampton Bridge*, 3 Wall., 51; *Butler's Appeal*, 73 Penn, St., 448; *East Saginaw Manufacturing Company vs. East Saginaw*, 19 Mich., 258; *Bank of the State vs. City of New Albany*, 11 Ind., 139.

In the case of *The Delaware Railroad Tax*, 18 Wall., 206, Justice FIELD, in delivering the opinion of the court, says (see page 225):

"It has been repeatedly held by this court that the legislature of a state *may* exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified purpose or perpetually, or may limit the amount or rate of taxation to which such property shall be subjected."

It is further held in this case that the property of a *private* corporation may be thus exempt from taxation; that it does not make any difference whether the uses of such corporation be *private* or *public* if the corporation be private. (See page 225.) See case of *Spencer, Trask, Constantine et al., U. S. Supreme Court*—not reported.

During the late war, the legislatures of many of the states enacted laws authorizing *local* municipal aid, by way of giving a bounty to volunteers, in order to save the particular municipality from an impending draft. These enactments were, in almost every instance where there validity was questioned, held valid; and as to whether a public benefit, a public interest, a public use or a public purpose was subserved or promoted thereby, was held to be a question of which the legislature was the *sole and exclusive judge*, and from its decision there was *no appeal.*

In the case of *The State, Ruckman vs. Demorest, Collector, etc.*, 3 Vroom, (N. J.) 528, Justice DALRIMPLE, in delivering the opinion of the court, says (see page 539—construing the constitutionality of two acts of the state legislature of 1863, and 1864, authorizing the issuing of the bonds of the particular locality, Bergen county, to the amount of $125,000, to be appropriated in the payment of bounties to volunteers, etc.):

"No express provision of the constitution of this state, nor of the United States, contravened by either of these acts, has been pointed out. The argument is, that the taxes authorized by them are not taxes for any of the great purposes of government, but a taking of private property for private use. In other words, the prosecutor, not being liable himself to draft, it was unconstitutional to tax him to exempt his neighbors, who were.

"Whether the interest of the people of the state, taking all circumstances into consideration, would be best promoted by suffering a draft or by levying a tax and paying bounties and filling the army by volunteers and substitutes, was a question of which the *legislature* was the *sole judge*; from their decision as to the equity, policy and wisdom of authorizing such a tax there is no appeal. * * * * We are clearly of the opinion that the legislature had the power to authorize the tax." *See Speer et al. vs. School Directors, etc.*, 50 Pa., 150; *Brodhead et al. vs. The City of Milwaukee*, 19 Wis., 624; *Dinehart vs. The Town of Lafayette et al.*, 19 Wis., 677; *Booth vs. The Town of Woodbury*, 32 Conn., 118; *Fowler et al. vs. Selectmen and Treasurer of Danvers*, 8 Allen, 80; *Coffman vs. Keightly, Auditor of Putnam County, et al.*, 24 Ind., 509; *King vs. Couse*, 25 Ind., 202; *The Board of Commissioners of Miami County vs. Hochstetter*, 26 Ind., 48; *The Board of Commissioners, etc., vs. Mertz*, 27 Ind., 103; *Nave et al., vs. King*, 27 Ind., 356; *Frank vs. Hetfield et al.*, 27 Ind., 503; *Miller vs. The Board of Cmomissioners of Putnam County*, 29 Ind., 75; *Dean vs. The Board of Commissioners of Putnam County*, 29 Ind., 117; *The Board of Commissioners of Fulton Couuty vs. Onstott*, 29 Ind., 384; *also, Freeland vs. Hastings*, 10 Allen, 585—to which special attention is called.

Legislative enactments authorizing local aid to turnpike and gravel road companies, by assessing a tax, called benefits, upon all real estate within specified distances of either side, and of the termini of the proposed turnpike or gravel road have been held valid, notwithstanding that such turnpike or gravel road companies were private corporations, organized solely for private gain. See *Goodrich vs. The Winchester and Deerfield Turnpike Company et al.*, 26 Ind., 119; *Law et al. vs. The Madison, Smyrna and Graham Turnpike Company*, 30 Ind., 77; *Anderson vs. The Kerns Draining Company*, 14 Ind., 199; *Reeves vs. Treasurer*, 8 Ohio, St., 333; *State vs. City of New Brunswick*, 30 N. J., 395; *Livingston vs. The Mayor, etc.*, 8 Wend., 85, and 4 Comst., 419; *The Providence Bank vs. Billings*, 4 Peters, 514, 591; *McCulloch vs. Maryland*, 4 Wheaton, 428.

Section 5, of article 12, of the Constitution of the State of Kansas, reads as follows:

"SECTION 5. Provision shall be made by general *law* for the organization of cities, towns and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power."

The *power* of *taxation, assessment, borrowing money, contracting debts and loaning their credit by cities, etc.*, is, by the foregoing provision of the constitution, expressly recognized as existing in the legislature. The power to determine for what use or purpose and to what extent cities, etc., may impose a tax or assessment or may borrow money, contract debts and loan their credit is thus *committed exclusively* to the legislature, and the legislative determination *is conclusive.*

In DILLON on Municipal Corporations, section 27, the learned author, while alluding to the foregoing provision in the constitutions of several of the states as having been derived from the constitution of New York, says:

"This obviously enjoins upon the legislature the duty of providing suitable and proper restrictions upon the enumerated powers, but in what these restrictions shall consist and how they shall be imposed are subjects left to the discretion or sense of duty of the legislative department with the exercise of which the courts cannot interfere."

In COOLEY'S Constitutional Limitations on page 518, the author says:

"And by some of the state constitutions it is expressly required that the state, in creating municipal corporations, shall *restrict* their *power of taxation* over the subjects within their control. These requirements, however, impose an obligation upon the legislature *which only its sense of duty can compel it to perform.* It is evident that if the legislature fail to enact the restrictive legislation, the courts have no power to compel such action."

In the case of *Hines et al. vs. The City of Leavenworth*, 3 Kansas, 199, Chief Justice CROSIER, in delivering the opinion of

the court, having under consideration section 5 of article 12 of the state constitution, says (see pp. 203–204):

"The provision is imperative, and every law upon the subject must contain restrictions. But who shall be the judge of the sufficiency of the restrictions? What tribunal shall determine what is an abuse of power? If this court, as plaintiffs urge, is to be the judge, by what rule shall it be guided? * * The same section provides that the power to borrow money and contract debts shall be so restricted as to prevent the abuse thereof. By what sort of a rule can this court fix the limit for these objects? * * * Such power would be more in consonance with the functions of a board of trade than of a judicial tribunal. The loan of the credit of a city to a railroad company might, under certain circumstances, be very judicious or injudicious exercise of the power, yet it is difficult to discover how a court could get before it all the facts necessary to a correct or even an intelligent determination of the question. * * Whatever the legislature determines to be a sufficient restriction, if it be a restriction at all, must be final." (See *Atchison vs. Bartholow.* 4 Kansas, 124.

In the case of *Benson vs. The Mayor, etc., of Albany,* 24 Barb., 258, Justice WRIGHT, in delivering the opinion of the court, says (see page 261):

"The remaining point of inquiry is, does the constitution prohibit the legislature from making grants of power of the character in question? It has been contended that the 9th section of the 8th article of the state constitution furnishes an affirmative answer to this question. It is in these words:

"It shall be the duty of the legislature to provide for the organization of cities and incorporated villages and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments, and in contracting debts by such municipal corporations.

"This section concedes and necessarily involves the exercise of a new and enlarged power of taxation, and perhaps of contracting a debt. * * * * * *

"The only qualification which it contains is that the power granted is to be restricted so as to prevent abuse.

"To construe the section under consideration as a prohibition, upon the legislature against granting any new and enlarged power appears to me to involve the incongruity of forbidding them to do at all what they are explicitly required to do in a particular manner.

"The judiciary have no power to correct the errors of indiscretion which the legislature may commit in the exercise of the power it possesses."

In the case of *The People vs. The Mayor, etc., of Brooklyn*, 4 Comst., 425, Justice RUGGLES, in delivering the opinion of the court, after quoting section 9, of article 8, of the state constitution, together with the proceedings of the constitutional convention, including the report of the committee and the debates thereon, says (see page 440):

"Instead of abolishing the system of assessments this section of the constitution refers it to the legislature for correction of its abuses. The direction given to restrict the power of cities and villages to make assessments presupposes and admits the existence of a power to be restricted. The constitution, therefore, in this section, recognizes and affirms the validity of the legislation by which city and village assessments for local purposes like that now in controversy are authorized, and seems to remove all doubt in relation to the legislative power in question."

In the case of *Clarke vs. The City of Rochester*, 24 Barb., 426, Justice STRONG, in delivering the opinion of the court says (see page 495):

"The 9th section of article 8, of the constitution, imposing upon the legislature the duty to provide for the organization of cities and villages and to restrict the power of taxation, assessments, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and contracting debts by such corporations is particularly relied on as prohibiting the legislation under consideration. The design of the section, so far as it makes it a duty of the legislature to restrict the

power of taxation, etc., of cities and villages was, in my judgment, to guard, by proper limitations, against abuses in contracting debts in the exercise of the powers granted to it by the legislature, *not* to limit the legislature in granting power to such corporations. If the latter had been the object, *some attempt* would have been made to specify and define the powers which might be granted. The subject would not have been left without specification and definition. What power may be granted? Where does the line of prohibition commence? The section contains *no* answer to these questions."

Justice JOHNSON says (same case, page 499):

"It is manifestly a subject of law, and therefore within the scope of the law-making power, unless excluded by some constitutional restriction. There is no restriction on this subject in the constitution. On the contrary, by article 8, of section 9, it is *expressly* made the duty of the legislature to regulate and restrict the power of incorporated cities and villages in loaning their credit, contracting debts and borrowing money. So it is to prevent abuses in assessments and in contracting debts by such municipal corporations.

"If, in the absence of all restrictions, express authority were needed, which cannot be pretended, the whole subject is *directly committed* to the supervision and control of the legislature.

"How far their powers shall be restricted in this respect, and to what extent they may exercise such powers without abuse, is necessarily matter of legislative judgment and discretion *exclusively*. It is a question with which the courts have nothing to do. It pertains in no respect to the judicial functions." *See Bank of Rome vs. The Village of Rome*, 18 N. Y., 38.

In the case of *The Bank of Rome vs. The Village of Rome*, 18 N. Y., 38, Chief Judge JOHNSON, in delivering the opinion of the court, and having under consideration section 9, of article 8, of the constitution, says:

"Now, from this provision, it is plain that the convention thought there had been and might be abuses in respect to the exercise of the named powers of municipal corporations. They, therefore, *enjoin upon the legislature the task* of restricting these

powers so as to prevent the abuses. * * * * Indefinite as is the rule of restriction prescribed by this provision, and ill-suited in its terms to be *judicially* applied, it still is both salutary and well-suited to be the *guide of legislative discretion.* It presents to the legislature the general object to be attained, the prevention of abuses in assessments, and contracting debts, and the general means of attaining the object, by restrictions on the powers to be conferred on municipal corporations; but it leaves to the *discretionary power* of that body *the determination of what are abuses.* * * * * If their judgment has been in any particular case erroneous, if the limit which they deemed sufficient has proved not narrow enough to exclude abuses, *surely their judgment is not to be reviewed and reversed in a court of law.* The rule is general that the *discretion* committed to one authority *is not to be reviewed by another.*

"I conclude, therefore, that the provision in question *does not set forth any rule by which a court can adjudge an act of the legislature to be void.*"

In the case of *The City vs. Lamson,* 9 Wallace, 485, which was an action commenced in the United States Circuit Court for the District of Wisconsin, upon interest coupons belonging to a certain series of bonds issued by the city of Kenosha.

Section 3, of article 11, of the constitution of the State of Wisconsin, reads as follows:

"It shall be the duty of the legislature to provide for the *organization* of *cities* and incorporated *villages* and to *restrict their power of borrowing money, contracting debts, and loaning their credit,* so as to prevent abuses in contracting debts by such municipal corporations."

The Legislature of the State of Wisconsin passed an act authorizing the city of Kenosha to "borrow, on the corporate credit of the city, *any* sum of money, for *any* term of time, and at *any rate of interest,* and payable at *any* place deemed expedient, and to issue bonds of scrip therefor."

Subsequent to the passage of the said act the city of Kenosha did borrow one hundred thousand dollars, to aid in the construction of a certain railroad, and issued the bonds of the city,

with interest coupons attached, being the interest coupons sued on, in payment therefor.

It was claimed that this act of the legislature was unconstitutional and void, for the reason it authorized the city of Kenosha to contracta a debt in *any amount*, without any limitation or restriction thereon, and that the proceedings of the city council, in contracting the debt and issuing the bonds, were also void, being had without authority

After the contracting of the said debt of one hundred thousand dollars by the said city of Kenosha, the legislature passed another act ratifying the proceedings of the city council in contracting said debt, and declaring the same legalized.

Justice NELSON, in delivering the opinion of the court, says (see page 485):

"The act of 1857, of the legislature, which amends and consolidates the several acts relating to the charter of the city, *confers full authority* upon the common council, *to borrow on the corporate credit* of the city any sum of money, for any term of time, at any rate of interest, and payable at any place deemed expedient, issuing bonds or scrip therefor. It is admitted this authority would be sufficient, but it is insisted that the statute *exceeds the authority* of the legislature under the *third section of the eleventh article* of the state constitution, which, it is asserted, requires the legislature to limit or restrict the amount of money to be raised by the city. Without inquiring into this question, IT IS SUFFICIENT TO SAY that after the city had passed the ordinance lending its credit to the railroad company, to the amount of one hundred thousand dollars, the legislature ratified it. This was equivalent to an original limit of this amount."

Section 6, of article 13, of the Constitution of the State of Ohio, reads as follows:

"The general assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power."

In the case of *Walker vs. City of Cincinnati*, 21 Ohio St., 14, Justice SCOTT, in delivering the opinion of the court, having under consideration section 6, of article 12, of the state constitution, says (see page 46):

"It is very clear that this constitutional mandate cannot be enforced according to judicial discretion and judgments. In the very nature of the case, the power which is to impose restrictions so as to prevent abuse, must determine what is an abuse, and what restrictions are necessary and proper." See *Hill vs. Higdon*, 5 Ohio St., 248; *Railroad Co. vs. Connelly*, 10 Ohio St., 165; *Maloy vs. Marietta*, 11 Ohio St., 636–638; *Campbell vs. Kenosha*, 5 Wall., 164.

In the case of *Brown vs. The State of Maryland*, 12 Wheat., 419, Chief Justice MARSHALL, in delivering the opinion of the court, says (see page 439):

"Questions of power do *not* depend upon the *degree* to which it may be exercised; if it may be exercised at all, it may be exercised at the will of those in whose hands it is placed." See *The People vs. Flagg et al.*, 46 N. Y., 401.

Section 5, of article 9, of the constitution of Illinois, of 1848, reads as follows:

"The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." In the recent unreported case of *Gill & Burr vs. The City of Carbondale*. See Chicago *Legal News*, July 25, 1874, page 350.

In construing the foregoing constitutional provision the Supreme Court of Illinois hold that a tax for a corporate purpose is a tax to be expended in a manner which will promote the general prosperity and welfare of the municipality which levied it. That it is the *interest* which such municipality has or may have in a proposed improvement that determines the question of whether or not the tax levied to aid such improvement is for a corporate purpose. See *Taylor vs. Thompson et al.*, 42 Ill., 9.

In the case of *The Township of Pine Grove vs. Edward B. Talcott*, in the United States Supreme Court, October term, 1873, not yet reported, Justice SWAYNE, in delivering the opinion of the court, and referring to the constitution of Michigan, says:

"The 13th clause of article 15, declares that 'the legislature shall provide for the incorporation and organization of cities and villages, and shall *restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit.*' * * * The language of this clause *clearly implies* that the powers to be restricted *may be exercised;* and what is implied is *as effectual* as what is expressed." See *United States vs. Babbit*, 1 Black., 61.

If it had been the intention and purpose of those who framed the constitution to limit the power of taxation, assessment, borrowing money, contracting debts and loaning their credit, by cities, towns and villages, to uses and purposes of an indisputable *public character*, why did they not say so, when committing to the legislature the exclusive control over this power without any limitations or restrictions whatever? Section 5, of article 12, of the constitution of the State of Kansas presents a proper case for the application of the maxim, "*expressio unius est exclusio alterius.*" See Broom's Legal Maxims, 581; *The Township of Pine Grove vs. Edward B. Talcott—Supra—Dubuque vs. The City of Dubuque*, 7 Clarke, (Ia.) 262; *Page vs. Allen*, 58 Penn., 338.

The learned circuit judge (DILLON) sustained the demurrer to the petition in the case at bar for the same reasons stated for sustaining the demurrer, in his opinion, in the case of *The Commercial National Bank vs. The City of Iola.**

The decision in this case is, perhaps, the first published decision of a court of record, directly upon the question of whether or not the legislature of a state possesses the power to authorize, by enactment, the extending of municipal or public aid, by an incorporated city, to encourage the establishment of manufactories within the limits of such city, and which tend to develop and improve the same. This decision, so far as the same is applicable to the case at bar, is based upon the broad assumption

*2 Dillon's C. C Report, 353.

that manufactories are purely *private* enterprises or objects, and subserve only a *private* use or purpose, as distinguished from *public* enterprises, objects, uses, or purposes. The following language is used: *

"It is important to be observed that this is undeniably a *private* enterprise. These buildings and works are the *private* property of the owners. *No public or municipal* control over this property, or the enterprise aided, is especially reserved or provided for, and none exists different from that which exists as to all other property owned by *private* persons and devoted to *private* uses. The proprietors of these works are under no obligation, by reason of the aid extended and the burthen of taxation thereby imposed upon the municipality, to render it or the state any duty or service whatever—not even to repay the loan, or to maintain for any specified time the contemplated manufacturing enterprise. The state or city could not compel them to complete or operate their works, or prevent their removal at pleasure to some other locality.

"And thus we have presented the inquiry than which no question concerning the property rights of the citizen is of more transcendant moment, viz: whether the legislature may thus compel or coerce the citizen to aid in the establishment of purely *private* enterprises or objects because these will or may incidentally promote the general good of the community or locality."

The foregoing is the Archimedean lever, with which the effort is now being made to lift the great weight of the *bona fide* bonded indebtedness from off these *would-be honest*, but over *self*-burthened cities.

If a precedent is to be established that when a municipal or public corporation shall, by its *voluntary contracts*, become burthened with debt, relief is to be sought in an appeal to the judiciary upon the alleged ground of *the want of legal ability* to contract such indebtedness—the plea of the *infant*, the *feme covert*, the *non compos mentis*, *etc.*, where will such proceedings

*See pp. 359-360.

end? Will not such cities be compelled to appear by *next friend* or *guardian adlitem* in the prosecution or defense of such actions?

It has been said that the *integrity* of a municipal or public corporation *is* its *only virtue*, "to violate or undermine which, is to undermine government itself, and to destroy the very institutions of the civil state." Will the judiciary countenance this species of *repudiation?*

Bonds of the character of those to which the interest coupons sued on belong, aggregating a very large amount, have been issued and put in circulation by various municipalities throughout the state of Kansas. These bonds are now mostly held by eastern capitalists, who, like the plaintiff in error, purchased them in good faith and at a fair price.

It is not denied but what the right exists to compel or coerce the citizen to aid in the building of railroads—this is *not* an open question.

If manufactories are undeniably *private* enterprises, are not railroads likewise undeniably *private* enterprises? If the buildings and works of the manufactories are the *private* property of the owners, are not the road-bed, the track, the rolling stock and equipments generally of railroads the *private* property of the owners? If there is no public or municipal control reserved or provided for over the *property* of the manufactories, is there any public or municipal control reserved or provided for over the *property* of the railroads? If the proprietors of the manufactories are under no obligation by reason of the aid extended and the burthen of taxation thereby imposed upon such municipality, to render it or the state any duty or service whatever, not even to repay the loan or maintain for any specified time the contemplated manufacturing enterprise, are the proprietors of the railroads under any obligation, by reason of the aid extended and the burthen of taxation thereby imposed upon the municipalty, to render it or the state any duty or service whatever, even to repay the loan or maintain for any specified time the contemplated railroad enterprise? If the state or city could not compel the manufactories to complete or operate their works, or prevent their re-

moval at pleasure, could the state or city compel the railroads to complete or operate their roads or prevent the removal of their property at pleasure?

Thus far there is certainly an exact parallel between manufactories and railroads. If manufacturing corporations be *private* enterprises, objects, uses or purposes, then railroad corporations are likewise *private* enterprises, objects, uses or purposes. Both are creatures of legistative enactment. Both, alike, owe their existence to the legislative will. The one is no more *public* in its character, use or purpose than the other. The public have no more interest in or control over the property of the one than the other. Both are created and operated exclusively for private gain.

Then in what does the distinction consist, if such exist, between manufacturing and railroad corporations, that municipal or public aid may not be extended to the one and may be extended to the other? It cannot be that the one is private in its character, or is a *private* use or purpose and the other public in its character or a *public* use or purpose. The *private* or *public* character, use or purpose of both is exactly the same. Both tend to develop and improve the particular municipality, thereby promoting alike the public good. In reality there is no distinction between these two classes of corporations so far as affects the question of extending municipal or public aid to them.

The government, both state and federal, possesses the power to regulate and control the right to exact fares or tolls on all roads, rivers, canals, ferries, bridges, etc., throughout the country which may be used for the purpose of transportation or inter-communication. The exercise, by an individual or corporation, of this right to exact fares or tolls on any road, river, canal, ferry, bridge, etc., which may be used for the purpose of transportation or inter-communication is a *prerogative franchise*, an attribute of sovereignty.* The railroad corporations exercise the right to exact fares or tolls for the transportation of passengers and freights over their roads. This is a prerogative franchise, hence the government may regulate and control its use.

* Vattel, Book 1, §§ 100–153; 25 Vermont, 442; 5 John, Ch., 101; 7 Conn., 48; *Bloodgood vs. M. & H. R. R. Co*, 18 Wendell, 65.

Then the distinction, if it can be called such, between manufacturing and railroad corporations is this, and *this only*, that while the earnings of the manufacturing corporations consist in the compensation received for converting raw material into manufactured articles, the earnings of the railroad corporations are derived through the medium of exacting fares or tolls as a compensation for the transportation of passengers and freights over their roads—a distinction which applies *solely to the earnings* that may accrue to these corporations, thereby affecting alone the interest of the stockholders in such corporations, and nothing more. The fact that the government may thus regulate and control the fares or tolls exacted by railroad corporations, does *not* affect or change the *private* or *public* character, use or purpose of such corporations, nor does it affect the public interest in or control over the property belonging to the same.

The Supreme Court of Wisconsin, having under consideration the exercise of this prerogative franchise, of exacting fares or tolls by railroad corporations, in an opinion delivered on the 15th day of September, 1874, says:*

"So far as the corporate franchises are concerned, the legislature is under a moral obligation not to reduce the tolls of railroads below a fair and adequate amount, but their power over the franchise is absolute. But the power to alter or repeal *cannot affect the property of corporations* other than the franchise. *Such right of property is inviolable.*"

The United States Circuit Court for the Western District of Wisconsin, in a recent opinion by Justice DAVIS and Circuit Judge DRUMMOND, holds a like doctrine to that set forth in the foregoing opinion of the Supreme Court of Wisconsin, that while the government may control the exercise of the prerogative franchise of exacting fares and tolls by railroad corporations, the *property* of such corporations *is inviolate.*†

The fact of the government possessing the power to regulate

* The case of *The Attorney General, etc., vs. The Milwaukee & St. Paul Railway Company*, being an action to enforce what is known as the Potter law—case unreported—see 1 Central Law Journal, September 24th, 1874, page 476.

† Suit by the Northwestern Railroad Company to restrain the enforcement of the Potter law. See 1 Central Law Journal, July 16th, 1874, page 348.

and control the fares or tolls exacted by railroad corporations—the exercise of a prerogative franchise—has given rise to the erroneous yet general conclusion that railroad corporations are *public* or, at least, *quasi public* corporations.

If the railroad corporations should choose to operate their roads free of charge; that is, should transport freight and passengers without exacting a fare or toll therefor, then and in that event the government would have no more control over them than over manufacturing corporations. Who ever heard of the government claiming anything more than the right to regulate and control the exacting of fares or tolls by railroad corporations? Aside from the right to exercise the prerogative franchise of exacting fares and tolls, there is *no distinction* between manufacturing and railroad corporations. If it be said that because railroad corporations exact fares or tolls, thereby exercising a prerogative franchise, the use of which the government may regulate and control, they thereby become *public* corporations and are *public* enterprises, objects, uses or purposes, then it may likewise be said that banks of issue are *public* corporations and are *public* enterprises, objects, uses or purposes.

The government, both state and federal, possesses the power to regulate and control the issuing of bank notes as a circulating medium. The exercise, by an individual or corporation, of the right to issue bank notes as a circulating medium is also a prerogative franchise, an attribute of sovereignty. Banks of issue exercise the right to issue bank notes as a circulating medium. This is a prerogative franchise, hence the government may regulate and control its use.

Judge REDFIELD, in speaking of prerogative franchises, says:*

"They exist in banks which practically supply the currency of the country, or its representatives; and in railways, which have already engrossed the chief business of international communication in this country, and almost throughout the civilized world; and both currency and internal communication between different portions of a state are exclusively the prerogative of sovereignty."

* Redfield on Railways, 87.

Senator TRACY says:*

"Banking corporations, insurance corporations, and many others are franchises, and the grant of them has been as *distinctly* on the ground of promoting the *public interest*, as the grant of railroads. In every sense bearing on this question, a license to keep a tavern is a franchise, and the obligation of the tavern-keeper to the public and to individuals *is as defined and as extensive in its nature* as that of railroad companies."

If the right to exercise a prerogative franchise by railroad corporations make them *public* corporations, as well as *public* enterprises, objects, uses or purposes, and thereby susceptible of receiving municipal or public aid, then the right to exercise a prerogative franchise by banks of issue will likewise make them *public* corporations as well as *public* enterprises, objects, uses and purposes, and thereby susceptible of receiving municipal or public aid. There is no distinction between the railroad corporation and the bank of issue in this respect. Banks of issue are designated *public* corporations as well as *public* uses and purposes.

Chief Justice MARSHALL, in speaking of the character of the United States Bank (which bears the same relation to the federal government that state banks of issue do to the state governments), says:†

"The bank is not considered as a *private* corporation, whose principal object is individual trade and individual profit; but as a *public* corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a *private business, and may be carried on by individuals or companies having no political connection with the government*, is admitted; but the bank is not such an individual or company."

It is *not* the *public character* of the corporation sought to be aided that determines the right of extending municipal or public aid to it, but it is the *municipal or public benefit, interest, use or purpose* flowing from the proposed improvement, whether such improvement will promote the *municipal* or *public* good.

* *Bloodgood vs. M. & H. R. R. Co.*, 18 Wendell pp. 65-66
† 9 Wheaton, page 863

Justice VALENTINE, in considering the question of extending municipal or public aid to railroad corporations, and as a reason for extending such aid, says:*

"We deny that railroad companies are strictly *prtvate* corporations, although we do not claim that they are strictly *public* corporations; and we deny that municipal aid to railroad companies is strictly for a private use; although we do not claim that it is strictly for a public use, though the object intended by the government is a public purpose; and we further say that it makes no difference, so far as this case is concerned, whether a railroad company is a private corporation or not. *The whole question depends upon the ultimate object, use or purpose intended by the government in granting the aid* to railroad companies, whether that object or purpose is public or private, and not upon the nature or character of the means used in eff cting or accomplishing that object."

Justice SHARSWOOD, as a reason for sustaining the validity of a legislative enactment authorizing municipal or public aid to railroads, says: †

"It is its *effect* not its *purpose* which determines its validity."

Justice BLACK, as a reason for sustaining the validity of a legislative enactment authorizing municipal or public aid to railroads, says: ‡

"It is the *interest of the city* which determines the right to tax her people for the road. That interest does not necessarily depend on the mere location of the road."

The Supreme Court of Ohio hold that the *public or corporate interest* in an improvement determines the question as to the right of taxation for its construction, and the fact that the contemplated improvement lies principally out of the state makes no difference. ‖

Chancellor WALWORTH says: §

"In all such cases the object of the legislative grant of power,

---

* *The Board of Commissioners of Leavenworth vs. Mulder*, 7 Kansas, 517.
† *The Pennsylvania R. R. Co. vs. Riblet*, 66 Penn. St., 169.
‡ *Sharpless vs. Mayor of Philadelphia*, 21 Penn. St., 171.
‖ *Walker vs. The City of Cincinnati*, 21 Ohio St., 14.
§ *Beekman vs. Saratoga & Schenectary R. R. Co.*, 3 Paige 73.

is the *public benefit derived from the contemplated improvement.*"

Chief Justice MARSHALL, says: *

"Measures calculated to produce such *benefits* to the public, though *effected through the medium of a private incorporation*, are undoubtedly *within the powers reserved to the states.*"

Justice PAINE, as a reason for extending municipal or public aid to railroad corporations, says: †

"They have done more to develop the wealth and resources, to stimulate the industry, reward the labor and promote the general comfort and prosperity of the country than any other, and, perhaps, all other mere physical causes combined. There is, probably, not a man, woman or child, whose interest has not, in some degree, been subserved by them."

Justice SWAYNE, as a reason for extending municipal or public aid to railroad corporations, says: ‡

"Where they go *they animate the sources of prosperity, and minister to the growth of the cities and towns within the sphere of their influence.*"

For like reasons should municipal or public aid be extended to encourage the establishment of manufactories which have also "stimulated industry, rewarded labor, promoted the general prosperity of the country," and "ministered to the growth of the cities and towns within the sphere of their influence." By the establishment of manufactories within such cities and towns the taxable values thereof are increased and the public burthens proportionately diminished and the municipal or public good promoted.

The case at bar is *not* at all a *parallel*, or even a *similar* case, on the facts to that of *The Commercial National Bank vs. The City of Iola;* but presents an entire different state of facts. That while it is claimed that the bonds to which the interest coupons sued on belong were issued and delivered to the King Wrought Iron Bridge Manufactory, and Iron Works of Topeka,

* *Wilson vs. The Blackbird Creek Marsh Co.*, 2 Peters, 251.
† *Whiting vs. Fond du Lac County*, 25 Wisconsin, 219—(Dissenting opinion).
‡ *The Township of Pine Grove vs. Edward B. Talcott*—decided at the October term of the United States Supreme Court, 1873. See Chicago *Legal News*, June 6, 1874, page 295.

Kansas, *as a donation*, such is *not*, in fact, true. These bonds were issued and delivered to such bridge company upon certain specific conditions, serving as a consideration therefor, viz: that such bridge company would, within ninety days from the date of the voting of the said bonds, or so soon thereafter as the same could, with a reasonable effort, be done, erect and furnish with all the necessary machinery, and have in actual operation bridge shops *within the corporate limits* of the city of Topeka, the defendant in error, the said bridge shops, to be of a certain capacity and in accordance with certain plans and specifications, such bridge company to contract with and obligate itself to the said city, with approved security, in the sum of one hundred thousand dollars to permanently establish and continue to operate for the term of twenty years the said bridge shops; that when said bridge shops were completed and in operation, then the manufactory of bridges at the city of Iola, Kansas, to be suspended, so as to give the said city, defendant in error, the benefit of the entire bridge business; that such bridge company was required to have a *bona fide* paid up capital of five hundred thousand dollars;* that before the said bonds were issued and delivered, such bridge company was required to execute and deliver to the said city an undertaking in the sum of *two hundred thousand dollars*, with security to the approval of the said city, conditioned for the faithful performing and carrying into effect all the said conditions, or in the event that such undertaking was not given then the said conditions were to be first performed and carried into effect to the satisfaction of said city.† It is admitted that these bonds *were* issued and delivered, in strict accordance with all the said conditions. These bonds purport to have been issued on the 15th day of August, 1872—five days after the same were voted, and, of course, before the erecting, etc., of the said bridge shops; that these bonds were delivered to such bridge company before the 28th day of August, 1872, and on the said 28th day of August, 1872, the same were registered in the office of the Auditor of the State of Kansas; hence an undertaking in the sum of two hundred thousand dol-

*See section IV, of ordinance set out in stipulation.
†See section V, of ordinance set out in stipulation.

lars, with security to the approval of the said city, was given by such bridge company, conditioned as hereinbefore stated; that thereupon such bridge company, in the language of the petition herein, "in consideration therefor and in full and complete compliance with all and singular the conditions upon which the said bonds were so made, executed, issued and delivered, proceeded to and did, at a great expense and outlay of money, to-wit: at a cost of three hundred thousand dollars, erect, establish, equip, maintain and operate bridge shops *within the corporate limits* of the said city of Topeka, defendant, *subject to taxation therein*, the same being of great value, interest and benefit to the said defendant.

"That after the erecting, establishing, equipping, maintaining and operating the said bridge shops within the corporate limits of the said defendant, as aforesaid, the said defendant, as a part of the conditions upon which the said bonds were so made, executed, issued and delivered, for and during the year 1873, did assess, levy and collect the regular city tax upon the said bridge shops as well as all the machinery and material connected therewith, and that the said defendant is now proceeding to assess, levy and collect upon the said bridge shops, as well as the said machinery and material belonging thereto, a similar tax for the year 1874."

Thus it appears that such bridge company, "by reason of the aid extended and the burthen of taxation thereby imposed," is not only bound to the said city, defendant in error, with approved security in the sum of two hundred thousand dollars, to perform all the conditions herein stated and to maintain and operate the said bridge shops for the term of twenty years, thereby rendering said city a valuable service, but has already laid out and expended within the corporate limits of said city, in the erecting, equipping, etc., the said bridge shops, a large sum of money, subject to taxation by the said city, and of wnich the said city has already availed itself. The said city could not only compel such bridge company to operate the said bridge shops for the period of twenty years, but could, in addition thereto, prevent the removal of said bridge shops to some

other locality. The said city is fully and completely indemnified and protected against loss; hence the objections so far urged by the learned circuit judge in the case of *The Commercial National Bank vs. The City of Iola* are fully met by the equitable arrangement existing in the case at bar.

The authorities cited by the learned circuit judge, as supporting the conclusion arrived at, in his opinion, have received a careful examination, and especially *Allen vs. Inhabitants of Jay*, 58 Maine, 590; *Lowell vs. The City of Boston*—not yet reported—*Bloodgood vs. M. & H. R. R. Co.*, 18 Wend., 65; *Jenkins vs. Andover*, 103 Mass., 94; *Curtis vs. Whipple*, 24 Wis., 350.

Allen vs. Inhabitants of Jay was decided in 1871.* This was a suit addressed to the equity side of the court, asking to enjoin the town of Jay, its officers, etc., from issuing certain bonds to the amount of ten thousand dollars, for the purpose of being loaned to Hutchinson & Lane, copartners, who, in consideration therefor, proposed to move their new saw-mill, grist-mill and box factory from the town of Livermore to the town of Jay. The issue of these bonds had been authorized by a vote of the inhabitants of the town of Jay. The legislature of the state subsequently, by enactment, ratified this vote and authorized the issuing of the said bonds. Justice APPLETON delivered the opinion of the court, and in considering the question of the validity of this legislative enactment, assumes, among other things, that the raising of money to loan to such persons as the town might designate as borrowers was not a legal exercise of the power of taxation. That a town cannot raise money to divide again among its inhabitants; that such enactments would authorize towns, if so disposed, "*to violate the principles of moral justice.*" That the constitution provides that private property shall not be taken for public uses without just compensation, etc. The right of eminent domain is an attribute of sovereignty. It is the right to seize and appropriate specific articles of property for the public uses, etc. But this is not the case of taking private property under the right of eminent domain, but of taking

* First published in the American *Law Register*, August number, 1873—page 481.

it under the power of taxation. That the constitution further provides that no person shall be deprived of his life, liberty, property or privileges but by the judgment of his peers, or the law of the land Property taken by taxation is not taken by the judgment of one's peers. A statute in violation of the *principles of justice* is *not* the law of the land. The constitutional provision that private property shall not be taken for public uses, etc., by implication, prohibits the taking of private property for *private* purposes. That it is *beyond the power* of the legislature, by force of enactment, to make that public which is essentially private.

The foregoing has been stated as showing some of the peculiar phases of this opinion.

The validity of legislative enactments is not determined by being weighed in the scale of the court's high sense of moral justice. This might vary under different circumstances and according to the different views entertained by different courts. That the constitutional provisions referred to, to-wit: that private property shall not be taken for public uses without just compensation, etc., and that no person shall be deprived of his life, liberty, property or privileges but by the judgment of his peers or the law of the land; have no application or reference to the taxing power are questions too well settled to now admit of argument.*

That the legislature of a state possesses the power to determine by enactment that a particular enterprise or improvement is of a public benefit, or of a public interest, use or purpose, although such enterprise or improvement be essentially private in its character or nature, is equally well settled.†

The case of *Lowell vs. The City of Boston* has not yet been reported, and nothing but the rescript sent down has been published; hence the writer of this, not having seen the full opinion of the court, refrains from commenting upon it.

As the other cases referred to involve the construction of different legislative enactments for different purposes, and each

*See *The Township of Pine Grove vs. Edward B. Talcott*, U. S. Supreme Court, October term, 1873; also authorities cited ante-page 46.
†See authorities cited ante pp. 21-36-40.

presenting a different state of facts from that existing in the case at bar, it is thought only necessary to call the attention of the court to them.

We now come to the consideration of the second proposition:

ESTOPPEL.

The bonds to which the interest coupons sued on belong were issued under and in pursuance of the two acts of the legislature of the State of Kansas hereinbefore referred to.* Section 76, of the first named act has been hereinbefore set out in full.† Sections 2, 3, 4, 5, 6, 7, 10, 11, 12 and 14, of the second named act are as follows:

"SEC. 2. Such bonds shall be issued in denominations of not less than one hundred dollars, and shall be payable at such place in the city of New York as the officers issuing the same may direct, in not less than five nor more than thirty years from the date thereof, with interest not to exceed ten per centum per annum, all in the discretion of the officers issuing the same, which said interest shall be payable semi-annually, at such place where the principal sum is made payable, and for which said interest said bonds shall have coupons attached. Such bonds, if issued by a county, shall be signed by the chairman of the board of county commissioners and attested by the county clerk; if issued by a city, shall be signed by the mayor and attested by the city clerk; and if issued by a township, shall be signed by the township trustee and attested by the township clerk.

"SEC. 3. Before any bonds shall be issued, as herein provided, the same shall be ordered by a vote of the qualified electors of such county, city or township.

"SEC. 4. When a petition, signed by at least one-fifth of the voters of any county, incorporated city or municipal township, said one-fifth to be determined by reference to the returns of the last preceding general elections, shall be presented to the board of county commissioners of such county, the mayor and common council of such city, or the trustee, clerk and

* See ante-page 13.
† See ante-page 13.

treasurer of such municipal township, asking that a vote be taken upon the question of building a bridge, or in aid of the construction of a railroad or water power, by donation thereto, or by the taking of stock therein, or for other works of internal improvement, such officers shall, within ten days after the presentation of such petition, call an election, to be held within thirty days thereafter, in such county, city or township, and shall give notice of such election by publication, for at least three consecutive weeks, in each newspaper published in such county, city or township, if any be published therein, and if none be published therein, by posting up written or printed notices, in at least five public places in each voting precinct in such county, city or township, for at least twenty days preceeding such election, which notice shall set forth the time and place of holding such election, the bridge proposed to be built, and for which bonds are to be voted, or the railroad or water power in the construction of which it is proposed to aid; whether such aid is to be by donation thereto, or the taking of stock therein, or other work of internal improvement, and for which bonds are to be voted: *Provided*, That a second special election upon any question or proposition under the provisions of this act may and shall be had upon a petition of two-fifths of the legal voters of said county, city or township, and such question or proposition shall not again be submitted, excepting at the spring or fall general election and upon the petition and notice herein first provided for.

"SEC. 5. Such election shall be held at the usual places of holding elections, in any such county, city or township, and shall be conducted by the officers or persons provided by law for the holding of elections in any county, city or township in this state; such election to be in all respects governed, and the result declared according to the rules and regulations provided by law for holding elections in any such county, city or township.

"SEC. 6. The vote at such election shall be by ballot; the tickets having written or printed thereon the words, "for the bridge and bonds," or, "against the bridge and bonds," or, "for the railroad donation and bonds," or, "against the railroad

donation and bonds," or, "for the railroad stock and bonds," or, "against the railroad stock and bonds," or for or against other works of internal improvement, as the case may be.

"SEC. 7. All persons, qualified voters, at any general election held under the laws of this state, shall be entitled to vote at such election.

"SEC. 10. The said officers of any county, city or township are hereby fully authorized and empowered to enter into any and all contracts necessary to carry into effect the provisions of this act.

"SEC. 11. That if the proposition for which bonds were voted be to aid in the construction of a railroad, or any bridge or other work of internal improvement, either by donation thereto or the taking of stock therein, then, upon the subscription being made therefor, as hereinbefore provided, the officers of such county, city or township [shall thereupon issue the bonds of such county, city or township] for the amount of such subscription, and shall forthwith deliver the same, together with the original, or a copy of the subscription, setting forth its terms in full to the treasurer of state, which said bonds shall be held by the said treasurer of state in escrow until the conditions in the terms of the said subscription to such railroad or other work of internal improvement shall be in all things fully complied with; that upon the conditions of the said subscription being in all things fully complied with, then the treasurer of state shall deliver such bonds to the parties entitled thereto, who shall have the same registered as hereinafter provided; *provided*, That such bonds shall not bear interest or be negotiable until after the delivery and registration thereof. *And provided further*, That in case of a failure to comply with the conditions in the terms of such subscription, then such bonds shall be, by the said treasurer of state, cancelled and redelivered to the county, city or township issuing the bonds. *And provided further*, That this section shall not apply where the people may have named some party as trustee in their vote on the proposition, and the contractor may thereafter agree to the same.

SEC. 12. The officers of any county, city or township issuing such bonds shall make registration thereof in a book to be kept for that purpose, showing the date, amount, number, maturity, and rate of interest of such bonds, and if issued for the building of a bridge, what bridge; or, if to aid in the construction of a railroad or other work of internal improvement, of what railroad or other work of internal improvement, and whether the same be a donation or for stock therein, and shall, at the time of issuing the same, make and transmit to the auditor of state a certified statement of the number, amount and character of the bonds so issued, to whom issued, and for what purpose, which statement shall be attested by the clerk of the county, city or township issuing the same, together with the corporate seal of such county, city or township, if any such there be.

"SEC. 14. Within thirty days after the delivery of such bonds the holder thereof shall present the same to the auditor of state for registration, and the auditor shall, upon being satisfied that such bonds have been issued according to the provisions of this act, and that the signatures thereto of the officers signing the same are genuine, register the same in his office, in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued; that the signatures thereto are genuine, and that such bonds have been registered in his office according to law, for which registration and certificate the auditor shall be entitled to a fee of one dollar for each bond so registered, to be paid by the holder thereof."

The remaining sections of said act provide, among other things, for the assessing, levying and collecting taxes for the purpose of paying the principal and interest of such bonds.

The allegations of the petition, the recitals contained in the said bonds, that they were issued under and in pursuance of the two acts of the legislature referred to, together with the matters set forth in the stipulation of the parties attached to and made a part of the record herein, present the following state of facts, to-wit:

1st. That a petition signed by at least one-fifth of the voters of the said city of Topeka, was presented to the mayor and councilmen thereof, asking that a vote be taken upon the question of issuing the said bonds for the purposes therein named.*

2nd. That such election was ordered by an ordinance passed at a meeting of the mayor and councilmen of said city, which ordinance set forth specifically the terms and conditions upon which the said bonds were to be issued and delivered; that upon the passage of said ordinance the same was duly published in *The Commonwealth*, a daily newspaper of general circulation, published in said city.†

3rd. That notice of the time and places of holding such election was given by publication for *three consecutive weeks* in *each* newspaper published in said city, the said notice being a proclamation of the mayor of said city, in which was set forth in full the said ordinance.‡

4th. That the said election was held at the usual places of holding elections in said city, and the vote was by ballot, the tickets having written or printed thereon the words, "*For the bridge shops donation and bonds*," or "*Against the bridge shops donation and bonds*," as the voter chose to vote. That a majority of the votes cast at such election were in favor of the issuing of the said bonds.§

5th. That the conditions upon which the said bonds were issued *were in all things fully complied with* and the said bonds being first registered by the officers of said city, in a book kept for that purpose, were thereupon delivered and afterwards duly registered in the office of the auditor of state, according to law. ‖

6th. That after the issuing, delivering and registration of the said bonds, and before the maturity of the *first* interest coupon attached thereto, the said city assessed, levied and *collected* a tax upon the taxable property within the corporate limits of said city for the payment of the *first* and *second* interest coupons at-

*See section four of second named act.
†See stipulation, ante-page 8.
‡See stipulation, ante-page 8.
§See sections 2 and 3, of ordinance, ante-page 10.
‖See stipulated ante-page 8. Sections 11 and 12, of second-named act. Also, petition, ante-page 3.

tached to the said bonds, and *at the maturity* of the said *first* interest coupon *paid* the same *out of the said tax* so assessed, levied and collected for that purpose. *

7th. That after the said *payment* of the said first interets coupon attached to said bonds and *while the money was in the hands of the proper officer for the purpose of paying the said second interest coupon at the maturity of the same* and before the maturity of either the said *second* or *third* of the said interest coupons the said bonds, with the said coupons attached thereto, *were, for value received, transferred to the plaintiff in error.*

8th. That the conditions upon which the said bonds were issued and delivered, and which was the consideration therefor, were that the King Wrought Iron Bridge Manufactory and Iron Works of Topeka, Kansas, should, within a specified time, erect, furnish with all the necessary machinery and have in actual operation, bridge shops within the corporate limits of the said city and subject to taxation by said city, the said bridge shops to be of a certain capacity and in accordance with certain plans and specifications. The said bridge shops to be permanently established in the said city. The said bridge company to contract with and obligate itself to the said city with security in the sum of one hundred thousand dollars, to the approval by the mayor and councilmen of said city, to so permanently establish and continue thereafter for the term of twenty years to operate the said bridge shops in the said city.†

9th. That before the said bonds were issued and delivered, as aforesaid, the said bridge company executed and delivered to the said city an undertaking in the sum of two hundred thousand dollars, with security to the approval of the mayor and councilmen of said city, for the faithful performing and carrying into effect the said conditions on the part of the said bridge company to be performed.‡

10th. That in consideration for the said bonds, and in *full* and *complete* compliance with all and singular the said conditions upon its part to be performed, the said bridge company *did*

* See petition, ante-pp. 4 and 5.
† See section 4, of ordinance, ante-page 10; also, petition, ante-page 3.
‡ See section 4, of ordinance, ante-page 10; also stipulation, ante-page 8.

at great expense and outlay of money, to-wit: at a cost of three hundred thousand dollars, erect, establish, equip, maintain and operate bridge shops within the corporate limits of said city, *and subject to taxation by the said city*, the same being of *great value, interest and benefit to the said city.**

11th. That the said city, as a part of the conditions upon which the said bonds were issued and delivered, did, for the year 1873, assess, levy and collect the regular city tax upon the said bridge shops, as well as the machinery and material connected therewith, and is proceeding to assess, levy and collect a similar tax for the year 1874.†

12th. That the said city has received and still retains the full and complete consideration for the said bonds.

All these proceedings were, at the time of their occurrence, well known to the officers, citizens and tax-payers of said city. *No* objection was made to the calling of the said election for the voting of the said bonds. *No* objection was made to the voting of the said bonds at said election. *No* objection was made to the issuing and delivering of the said bonds to the said bridge company. *No* objection was made to the registration of the said bonds and the placing of the same upon the market. *No* objection was made to the said bridge company laying out and expending a large sum of money in the erecting, establishing, equipping, maintaining and operating bridge shops within the corporate limits of said city, and subject to taxation by said city as a part of the consideration for said bonds. *No* objection was made to the assessing, levying and collecting the regular city taxes upon the said bridge shops, etc., as a part of the consideration for said bonds. And last, but not least, *no* objection was made by the officers of said city, or by any citizen or taxpayer thereof, to the assessing, levying and collecting a tax upon the taxable property within said city to pay the first and second interest coupons attached to said bonds and the payment of the said first interest coupon at the maturity th reof. After all this acquiescence on

* See petition, ante-page 3.
† See petition, ante-page 3.

the part of the officers of the said city as well as the citizens and taxpayers thereof, the plaintiff in error in good faith and for a valuable consideration purchased the said bonds, and is now the owner and holder of the same.

Corporations, including public or municipal corporations, are bound by estoppel *in pais* the same as natural persons. See Bigelow on Estoppel, 464; Herman's Law of Estoppel, 509 and 512; *Moran et al. vs. The Commissioners of Miami County*, 2 Black (U. S.), 722; *Zabriskie vs. Cleveland, etc., Railroad Company*, 23 Howard, 400; *Commissioners of Knox County vs. Aspinwall*, 21 Howard, 539; *Rogers vs. Burlington*, 3 Wallace, 654; *Pendleton County vs. Amy*, 13 Wallace, 297; *The Town of Keithsburg vs. Charles A. Frick*, 34 Illinois, 405; *Royal British Bank vs. Tarward*, 6 Ellis and Blackburne, 327; *Hale vs. Union, etc., Insurance Company*, 32 N. H., 295.

Contracts of Corporations *void for the want of power or ability to make them* may be rendered *valid* by the aid of estoppel.

In HERMAN'S Law of Estoppel, page 510, the author says:

"The principle that when a contract is void, essentially from *want of power or ability, it can be rendered valid* by *the aid* of the doctrine of estoppel, is applied in full force when a body corporate transcends the limitations imposed by its charter, and the defect cannot be cured by the acts or representations of its officers or agents, or even by an express recital that an authority exists, which is, in fact, wanting. Redress must be sought in a suit to recover back the consideration, or an action on the case against the persons guilty of the fraud, although it has been held that an estoppel may grow even under these circumstances out of a long continued acquiescence in or the enjoyment of the fruits of the contract." See *Hood vs. N. Y. & N. H. R. R.*, 22 Conn., 502; *Treadwell vs. Com., etc.*, 11 Ohio, 183; *Hopple vs. Brown*, 13 Ohio, S., 311; *Garret vs. Van Horn*, 7 Ohio, S., 397; *Goshen vs. Shoemaker*, 12 Ohio, S., 623; Angell & Ames on corporations, section 256.

In SEDGEWICK, on Statutory and Constitutional Law, page 90, the learned author says:

"It must be further borne in mind that the invalidity of contracts made in violation of statutes, is subject to the equitable exception that, although a corporation in making a contract, acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity, of organization, or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degreee inequitable and unjust, to permit the defendant to repudiate a contract, the fruits of which he retains. And the principle of this exception has been extended to other cases. So a person who has borrowed money of a savings institution upon his promissory note, secured by a pledge of bank stock, is not entitled to an injunction to prevent the prosecution of the note, upon the ground that the savings bank was prohibited by its charter from making loans of that description. *See The Township of Pine Grove vs. Edward B. Talcott*, U. S. Supreme Court, October term, 1873; *Bissell vs. Michigan &c. R. R. Co.*, 22 N. Y., 259; *Palmer vs. Lawrence*, 3 Sand., S. C., 162; *Steam Navigation Company vs. Weed*, 17 Barb., 378; *Chester Glass Co. vs. Dewey*, 16 Mass., 94; *McCutcehion vs. Steamboat Co.*, 13 Penn., R., 13; *Potter vs. Bank of Ithaca*, 5 Hill, 490; *Suydam vs. Morris Canal and Banking Company*, 5 Hill, 491; *Sacketts Harbor Bank vs. Lewis County Bank*, 11 Barb., 213; *Mott vs. U. S. Trust Company*, 19 Barb., 55 8.

In KENT'S Com. (Comstock's edition), vol. 4, page 282, the author says:

"The sense of estoppel is, that a man, for the sake of good faith and fair dealing, ought to be estopped from saying that to be false which, by his means, has once become accredited for truth, and by his representations has led others to act." See *Lee vs. Tellotson*, 24 Wend, 337; 3 Hill, 219.

Every person is bound to speak and act according to the truth, and the law will presume such to be done and will not allow such presumption to be contradicted. *See Pelletreau vs. Jackson*, 11 Wend., 117; *Jackson vs. Waldon*, 13 Wend., 178.

In the case of *Society for Savings vs. The City of New London*, 29 Conn., 174, which was an action upon interest coupons or warrants belonging to certain bonds issued by the city of New London, to be loaned upon proper security, to the New London, Willimantic and Springfield railroad company—a corporation. These bonds were delivered and put upon the market and passed into the *hands* of *bona fide holders*, with the knowledge of the inhabitants of the city of New London. Some of them had been deposited with the treasurer of State by certain banks as security for their circulation, and the city having paid the semi-annual interest for several years. During all this time no citizen had taken any measures to prevent the sale of the bonds or the payment of the interest. It was held that the city, under these circumstances, *was* equitably estopped from denying the validity of the bonds against parties who held them in good faith, and that *individual citizens and taxpayers* having thus acquiesced in the conduct of the city *were also estopped* from denying their validity, so far as their individual rights were concerned. Justice ELLSWORTH, in delivering the opinion of the court, says (see pp. 190–192–193–194):

"These bonds soon passed into the hands of *bona fide* holders at something more than their par value. Some were taken by individuals and some by the banks of this state. * * * * The most unreserved publicity was given to all these proceedings, and no objection was ever made by any of the citizens of New London. Further, for several years the City of New London continued to pay the coupons attached to the bonds, and these payments regularly appeared in the city treasurer's annual reports.

"Now, if this be all there is in the case, it is most obvious that the city can make no valid defence to the suit, we propose to show, in effect, that this is so, certainly as to *bona fide* holders of the bonds, whether we examine the case upon principles of natural justice or of law and equity.

"The proceedings of the city in issuing the bonds were well known to all the citizens. We must consider them as conversant with the votes of April 14 and July 31, and everything that was done under the votes; the issuing of the bonds in the name

of the city; the delivery of them to the New London, Willimantic and Palmer railroad corporation for their use; the advertisement of them in the public papers, and the fact that they were bought by honest purchasers, from time to time, for the ultimate benefit of the citizens themselves. They knew, too, that the bonds were taken by the treasurer of the state as security for the issue of bank paper. If all this was without authority, *why*, we ask, did not the *citizens then* make their objections? *Why* did they *not enjoin* the city agents from further proceedings? At least, *why did they not give notice* to the public, and put purchasers on their guard, when they knew that a grievous loss must ensue if the bonds were unauthorized? We must believe that, after such acquiescence, it would be an outrage upon morality and justice, and an impeachment of the integrity of the citizens of New London, to allow the city to repudiate its obligations for such a cause. Many of the citizens, we well know, disapprove and condemn such a repudiation, and we trust all of them would do so were it a simple transaction between man and man, where the culpability could not be thrown off upon a municipal corporation. But it is this very circumstance which enhances the impropriety of the act of repudiation, for the integrity of a public body is its principal virtue. To violate or impair this is to undermine government itself and to destroy the very institutions of the civil state. Such repudiation cannot receive the countenance of this court of justice. (The following authorities are here cited and approved to-wit:)

"*The State vs. Van Horn*, 7 Ohio, S. R. 327; *Knox County Commissioners vs. Aspinwall*, 21 Howard, 539; *Tash vs. Adams*, 10 Cush., 252; *Graham vs. Maddox*, 6 American Law Reg., 595–618; *Gould vs. Venice*, 29 Barb., 442.

"It was said on the argument, that however proper it might be to compel the city of New London to fulfil her engagements, if the city, as such, were alone affected, yet that *individual citizens, tax-payers*, have rights of their own, which they may defend in the name of the corporate body. But we can recognize *no* such independent character in the citizen. Besides, the city alone appears here to defend. And, if the individual citizens

were to be considered as appearing for themselves, they could only defend in the name and according to the rights of the city."

"As we have already said, *if we may look through* the body to notice the individuals as distinct from the corporation, we must notice them as individuals throughout the proceedings upon which we have been commenting, and then we see them *sitting with folded hands, silently countenancing the usurpation and fraud* of which *they are now* complaining."

The foregoing decision is *cited* and *approved* by the U. S. Supreme Court in the case of *Moran vs. Commissioners of Miami County*, 2 Black, on page 732.

In the case of *The President and Trustees of the Town of Keithsburg vs. Frank*, 34 Ill., 405, which was an action upon interest coupons belonging to certain bonds issued by the town of Keithsburg to the Warsaw & Rockford Railroad Company. The bonds were delivered and put upon the market and passed into the hands of *bona fide* holders. The town of Keithsburg assessed, levied and collected taxes for the interest upon these bonds for several years. It was held that the town was estopped from questioning the validity of the bonds. Justice BREESE, in delivering the opinion of the court, says (see pp. 421–422):

"Whether, then, the bonds were issued in and by virtue of the second section of the act of 1857, or of the 17th section, we think the corporation is *estopped* from now setting up any irregularity in their issue, inasmuch as they *have repeatedly recognized* their validity by paying them out, levying taxes and paying interest on them for a series of years. It is now too late to raise a question as to the regularity of their issue." See *Maher vs. City of Chicago*, 38 Ill., 266.

In the cases of *Ferguson vs. Landrum, etc.*, and *Cloud, etc., vs. Coleman, etc.*, decided in 1865, 1 Bush (Ky.), 548, in an action by the taxpayers to enjoin the collection of a certain tax assessed and levied to pay interest upon certain bonds issued by Gallatin and Boone counties, Kentucky, for the purpose of paying bounties to volunteers in order to avoid an impending draft

ordered by the President of the United States, in August, 1864. That, notwithstanding the court held that the enactments of the legislature authorizing the issuing of such bonds unconstitutional and void, it was further held that persons having *voluntarily accepted* the benefits *of unconstitutional local legislative enactments* must bear their proportion of the burthens imposed by such enactments. Before they will be heard to ask equity they must do equity; before they can escape from responsibility, they must honestly return every cent which has been laid out and expended to their use and benefit, and until these things are done, courts of justice should not hear their clamor for justice.

Judge WILLIAMS, in his opinion, reported on pp. 599–600, says:

"But because an involuntary assessment cannot be coerced from those who took no part in obtaining said enactments, who never affirmed nor ratified them, and who never accepted the benefits thereof, *it does not follow* that therefore those who were instrumental in procuring these enactments, who participated in and shared their benefits, *and who have by acts ratified the same, are also to escape.* This would be contrary to the most solid principles of law and exalted equity. By their own voluntary acts they should be considered estopped from setting up any objection to these statutes or the tax levied by virtue of their provisions. No court of justice should hear them in setting up their own wrong; no court should lend a willing ear to their complaint after being instrumental in borrowing from the community a large amount in sums of from five to one thousand dollars, and inducing gentlemen to borrow from the banks large amounts on their own individual credit, relying upon their promises to return by way of taxation.

"And especially should no court hear those who, through the instrumentality of these enactments, were enabled to procure volunteer substitutes, and thereby escape from this dangerous and arduous service. Having voluntarily accepted the benefits of these enactments, they must bear their burthens; before they can be permitted to escape from responsibility they must honor-

ably return every cent which has been laid out and expended to their use and benefit; and until these things are done, courts of justice should not hear their clamor for justice.

"To permit these persons to get the benefit of an outlay of near one hundred and eighty thousand dollars and then escape from its payment, is lending the aid of a court of justice to consummate one of the most stupendous frauds ever perpetrated in the commonwealth.

"The services of these volunteer substitutes were of the most arduous and perilous character, and therefore constituted the most meritorious and valuable consideration; and where money was borrowed or loaned to pay them, the liability to return stands on the same meritorious and valuable consideration; and those who through their own agency and inducements procured these enactments, or since have affirmed them and accepted the consideration, cannot be permitted to challenge their validity and at the same time *pocket* their benefits.

"So far as this class of taxpayers is concerned, these statutes are obligatory, because of their voluntary consent to their provisions and acceptance of their benefits."

The foregoing cases were again before the Supreme Court of Kentucky in 1868, and after a full consideration, the previous opinion of the court was affirmed and approved. See *Ferguson, etc., vs. Landrum, etc.*, 5 Bush (Ky.), 230.

In the case of *Zabriskie vs. Cleveland, etc., Railroad Co. et al.*, 23 Howard, 381, Justice CAMPBELL, in delivering the opinion of the court, says (see pp. 400–401):

"These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence. They have circulated without an effort on the part of the corporation or corporators to restrain them, or to disabuse those who were influenced by these apparently official acts. Men have invested their money on the assurance they have afforded.

"A *corporation*, quite as much as an individual, is held to a careful adherence to the truth in their dealings with mankind, and cannot, by their representations or silence, involve others in

onerous engagements, and then defeat the calculations and claims their own conduct had superinduced." See *Knox County vs. Aspinwall*, 21 Howard, 548; *The Rector, etc., of Christ Church, etc. vs. The County of Philadelphia*, 24 Howard, 300 *Rogers vs. Burlington*, 3 Wallace, 654.

That the bonds to which the interest coupons sued on belong are negotiable commercial paper is a proposition well settled by the adjudications of this court.

The case presented, then, is this: The city of Topeka, the young and ambitious capital of a growing western state, desirous to maintain its supremacy and to achieve the ascendancy over its rival sister competitors, seeks to develop a manufacturing interest within its limits; seeks to obtain the prestige of fostering the largest manufacturing establishment of the kind in the Union, and to forward this end proposes to the said bridge company that if it will erect, equip, operate and maintain, for the period of twenty years, the proposed bridge shops within the limits of said city, and subject to taxation by said city, that it, the said city, will aid and encourage such enterprise by issuing and delivering, for such purpose, its negotiable bonds to the amount of one hundred thousand dollars, payable twenty years after date, with the usual semi-annual interest. The said bridge company accepts the proposition, and thereupon enters into a contract with said city, with security in the sum of two hundred thousand dollars, to the approval of said city, for the faithful performance of the conditions therein set out. That the bonds of the said city to the amount of one hundred thousand dollars are issued and delivered to the said bridge company. The said bridge company places said bonds upon the market. That with the money obtained from the sale of said bonds, together with a large sum in addition thereto, the said bridge company is enabled to and does erect, equip, operate and maintain bridge shops within the limits of said city in *strict compliance* with the terms of the said contract. That the said city, having thus obtained all that it sought to obtain, and still retaining the same, and knowing that the bridge shop buildings so erected could not be removed, or the bridge business so estab-

REPLY.

The plaintiff in error in reply to the argument of the learned council for the defendant in error deems it necessary to say—

1st. That the two acts of the Legislature of the State of Kansas referred to, authorizing the issuing of the bonds to which the interest coupons sued on belong, were both enacted by the same Legislature, and were approved and took effect within six days of each other. The second named act,* authorizing counties, incorporated cities, (including cities of the second class,) and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power, or other works of internal improvement, &c., and providing in detail for the calling of elections, and the voting and issuing of such bonds, was published and took effect on the 7th day of March, 1872. The first named act,† providing for the incorporation of cities of the second class, &c., the 76th section of which confers upon cities of the second class, in addition to the powers already conferred by the second named act, the power to issue bonds to encourage the establishment of manufactories and such other enterprises as may tend to develope and improve such cities, was published and took effect March 13th, 1872, six days after the second named act had been in force. There is no conflict between these two enactments, but on the contrary they are in perfect harmony with each other, hence they are to be construed *inpari materia.*‡

2d. The first named act does not infringe section 5, of article 12 of the Constitution of the State of Kansas, by failing to *restrict* the power of taxation, assessment, borrowing money, contracting debts and loaning their credit so as to prevent the abuse of the same by cities of the second class. Section forty of said act contains *an express*

* Laws of Kansas, 1872, page 110.
† Laws of Kansas, 1872, page 215.
‡ See the State *vs.* Buckley, 2 Blacf, p. 349.

limitation, viz: That at no time shall the bonded indebtedness of any such city exceed twenty per cent. of the taxable property within such city.

3d. The Hugh Quinn referred to was a citizen of the State of Kansas, and died in battle, leaving no heirs; *his estate escheated to the State, and therefore became the property of the State;* the Legislature declared Emma Jane Gird to be the sole heir of the said Hugh Quinn, to whom she was the affianced wife, and to whom the said Hugh Quinn, in his dying moments, expressed a desire that his property should descend. The Legislature did not transcend its authority in this act.

4th. The Topeka Bridge Company never owned or operated bridge shops at the city of Iola, and was never at any time, in any manner, interested in the city of Iola or its manufacturing enterprises, and never at any time received any of the bonds of said city for any purpose whatever.

5th. The city of Topeka never for a moment entertained the thought of repudiating the bonds in controversy until after the decision of Judge DILLON in the case of *The Commercial National Bank* vs. *The city of Iola.** After the rendering of this decision the city councilmen of the city of Topeka, who like all similar bodies, was on the lookout for an opportunity to do good and to economize in city expenses, notwithstanding they had called the election for the voting of the said bonds, had appropriated money out of the city treasury to defray the expenses of such election, had issued and delivered the said bonds, had assessed, levied, and collected a tax upon the taxable property within said city to pay the first and second interest coupons attached to said bonds, at the maturity thereof, and had paid the said first interest coupon at the maturity thereof, now appropriates an additional large sum of money out of the city treasury to pay learned counsel to assist

*2 Dillon, C. C. R. 353.

the regularly salaried city attorney to resist the payment of the interest upon the said bonds.

6th. It is due to a large majority of the principal taxpayers and citizens of the city of Topeka to say that they are in favor of paying the interest upon the said bonds, and are opposed to the attempted repudiation of said bonds by the city councilmen.

ALFRED ENNIS,
Attorney for plaintiff in error.

lished be discontinued without *irretrievable loss* to the said bridge company, now, blind to its honor, integrity and good name, seeks to avoid the payment of the honest debt thus incurred for the *sole* and *only* reason, as alleged, *that it did not have the power to contract such debt.*

WHEREFORE, the plaintiff in error prays that the judgment of the circuit court in sustaining the demurrer to the petition and rendering judgment in favor of the defendant in error be reversed.

ALFRED ENNIS,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States,

OCTOBER TERM, 1874.

THE CITIZENS SAVINGS AND LOAN ASSOCIATION OF CLEVELAND, OHIO, *Plaintiff in Error,*

No. 729. vs.

THE CITY OF TOPEKA, KANSAS, *Defendant in Error,*

AND

THE COMMERCIAL NATIONAL BANK OF CLEVELAND, OHIO, *Plaintiff in Error,*

No. 741. vs.

THE CITY OF IOLA, IN THE COUNTY OF ALLEN AND STATE OF KANSAS, *Defendant in Error.*

PETITION FOR REHEARING.

WILLEY, TERRELL & SHERMAN,
For Petitioners.

Fairbanks, Benedict & Co., Printers, Cleveland.

In the Supreme Court of the United States,

OCTOBER TERM, 1874.

THE CITIZENS' SAVINGS AND LOAN ASSOCIATION OF CLEVELAND, OHIO, *Plaintiff in Error*,

No. 729.

vs.

THE CITY OF TOPEKA, KANSAS,
Defendant in Error.

AND

THE COMMERCIAL NATIONAL BANK OF CLEVELAND, OHIO,
Plaintiff in Error,

No. 741.

vs.

THE CITY OF IOLA, IN THE COUNTY OF ALLEN AND STATE OF KANSAS.
Defendant in Error.

PETITION FOR REHEARING.

The Citizens' Savings and Loan Association of Cleveland, Ohio, and the Commercial National Bank of Cleveland, Ohio, the plaintiffs in error in the above entitled actions, respectfully ask this Honorable Court to grant them a re-hearing therein, and that further argument may be heard upon the following points, to wit:

FIRST.—Is an act of a State legislature unconstitutional which does not violate any *specific* clause of the State or National Constitution?

SECOND.—Can an act of a State Legislature be declared unconstitutional because of a supposed repugnancy to the *spirit* of the Constitution or of our institutions?

THIRD.—Is the Legislative determination as to what is a *public purpose* final, or is it subject to review by the Courts?

FOURTH.—Is it the *public character* of the corporation sought to be aided that determines the right to extend municipal aid, or is it the *public or municipal benefit interest, use* or *purpose* to be thereby subserved that determines?

FIFTH.—Of what weight is the practical legislative and departmental action in Kansas in determining the constitutionality of these acts?

SIXTH.—Upon familiar principles cannot these bonds in the hands of these plaintiffs be upheld, even if now by judicial determination the acts authorizing them shall be declared unconstitutional?

With profound respect for the Court, we desire to submit whether the decision in these cases, upon the first three points above suggested, is not subversive and revolutionary, as to important doctrines which had been considered well established.

I. It declares an act of a State legislature unconstitutional without *specifying* the clause of the Constitution which it violates. Indeed, by strong implication, it concedes that there *is* no such clause.

Out of a line of State and National decisions, practically unbroken in its uniformity, we quote the language of Mr. Justice Swayne, in *Township of Pine Grove, vs. Talcott*, 19 Wallace 666.

"It is an axiom in American jurisprudence that a statute is not to be pronounced void upon this ground unless the repugnancy to the Constitution be clear, and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. *The particular clause of the Constitution must be specified*, and the act admit of no reasonable construction in harmony with its meaning."

II. It declares an act of a State legislature unconstitutional because in the opinion of the Court it is repugnant to the *spirit* of the Constitution and of our institutions.

As far as we know, the line of decisions in this country, both State and National, to the contrary of this doctrine was unrelieved by a single exception until the decision of the Court in these cases.

III. It declares that the judicial department of the State is the proper authority to determine what should and what should not constitute a public burden.

Looking beyond the interests of the parties to these suits, it is upon this point, as a public question, that, in our judgement, the decision of the Court in these cases is fraught with consequences which may well be regarded as momentous.

Among the great expounders of the Constitution and of our political system, both within and without the profession, it has always, we submit, been a cardinal doctrine, that this question was one peculiarly of legislative judgment and discretion.

Cooley says,—" *What is for the public good, and what are public purposes, and what does properly constitute a public burden,* are questions which the *legislature must decide* upon its own judgment.

Again,—" In this place, however, we do not use the word *public* in any narrow and restricted sense, nor do we mean to be understood that whenever the legislature shall over-step the legitimate bounds of their authority, the case will be such that the Courts can interfere to arrest their action. There are many cases of unconstitutional action by the representatives of a people which can be reached only through the *ballot-box.* * * * * * * *It must always be conceded that the proper authority to determine what should and what should not properly constitute a public burden, is the legislative department of the State.*"

In *Providence Bank vs. Billinys,* 4 Peters 514, Chief Justice Marshall, speaking of the power of taxation, p. 563, says,—" This vital power may be abused. * * * * The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the *only* security where there is no express contract, against unjust and excessive taxation as well as against unwise legislation generally."

In the case of *Railroad Co. vs. Otoe County*, 16 Wallace, 667, Mr. Justice Strong says:—"No one questions that in the absence of some constitutional inhibition, the power of a State to appropriate its money, however raised, is *limited only* by the sense of justice and by the *sound discretion* of its legislature. If the power to tax be unrestricted, the power to appropriate the tax is necessarily so. Accordingly nothing has been more common in the State and Federal governments, than appropriations of public money raised by taxation to objects in regard to which no legal liability existed. State legislatures have made donations to numerous purposes, whenever, *in their judgment*, the public well-being required them, and the right to make such gifts has never been seriously questioned. As has been said, *the security against abuse of power by a legislature in this direction is found in the wisdom and sense of propriety of its members, and in their responsibility to their constituents.*"

In the case of the *Township of Pine Grove vs. Talcott*, 19 Wallace 666, Mr. Justice Swayne says: "Under the limited powers conferred by the Federal Constitution, Congress has frequently given aid in such cases. The Pacific Railroads and Louisville Canal furnish instances of such action by that body. The gift to the sufferers from the overflow of the Mississippi, and prior acts of that kind must be borne in mind. Cannot a State legislature do the same things?

"*It does not belong to courts to interpolate constitutional restrictions.* Our duty is to apply the law—not to make it. *All power may be abused where no safe-guards are provided. The remedy in such cases lies with the people*, and *not* with the judiciary."

In the case of *S. & V. R. R. Co., vs. City of Stockton*, 41 Cal. 147, Justice Wallace says:

"*Public use, public purpose*, and *public policy* are much the same import. *Public* policy, the policy upon which governmental affairs are conducted for the time being, is legislative policy in the main, and *public use* and *public purpose* are largely dependent upon this *policy*, notoriously varying in our country from time to time with the accession to power of political parties, differing from each

other as to the system of measures best adapted to promote the interests of the State. The resolve of a legislative body, by which a tax is imposed or private property taken is, therefore, necessarily a legislative determination that a public use is to be promoted by the tax or the taking directed, and such a determination is the determination of a *merely political* question by the *political department* of the Government."

* * * * * * * * * * * * *

"The legislative judgment may have discovered a *public use* and a *public benefit* in the encouragement of a particular class of improvements in the State." * * * * * * * *

"We may be ourselves unable to see why the particular work thus selected for government aid should be preferred to another work of equal, or, perhaps, in our judgment, of even greater public importance, but which has, nevertheless, been wholly overlooked: but we *cannot*, upon such a view, *forbid* the government aid to the work selected, any more than we could direct a similar bounty to the work, in our judgment, unreasonably omitted."

We have thus given a few extracts from the thousand and one opinions that lay ready at our hands to show that this is a question of *public policy* simply, and that questions of public policy are *purely political*, and belong to the legislative department of the State.

We might instance in this connection the numerous laws in many States, for the encouragement of mere *private industry*, whereby public aid has been extended, such as, laws encouraging by public aid the manufacture of sugar from sorghum and beets, the production of flax, hemp, cotton, tobacco, &c., laws for the encouragement of silk culture, &c.

These laws are all parts of the same public policy which seeks to encourage home manufactures by oppressive tariffs upon foreign productions.

To hold that these questions of public policy, which from the foundation of the government to the present day have been deemed merely political questions belonging to the political department of the state, are subject to review and final determination by the

judicial department of the state, seems to us calculated inevitably to lead to conflict between the legislative and judicial powers.

The fact that we find in the opinion of the Court in these cases scarcely a reference to the comparatively important questions above suggested has led us to suppose that they had not been distinctively pressed on the attention of the Court and encouraged us, in part, respectfully to make this application.

IV. Upon the Fourth Point suggested for reargument we submit, in the language of Chief Justice Marshall in *Wilson vs. The Blackbird Creek Marsh Company*, 2 Peters, 245, "That measures calculated to produce such benefits to the public, *though effected through the medium of a private incorporation*, are *undoubtedly* within the powers reserved to the states."

Two very recent decisions upon this, and the other points urged, will be called to the attention of the Court, viz:—

The County Court of St. Louis County vs, W. D. Griswold, et. al., Supreme Court of Missouri, published in Central Law Journal, Vol. 2, Jan'y, 22nd 1875, p. 56, and *Scudder vs The Trenton Delaware Falls Company*, 1 Saxton (N. J.) 699.

These cases, decided since the decision in the cases at bar, maintain the principles above contended for by us, and the New Jersey case was the case of a private manufacturing corporation.

V. The Fifth Point suggested does not seem to have been argued by counsel or to be referred to by the Court. Is it not of great weight in determining the question of constitutionality?

In the case of *Talcott vs. the Township of Pine Grove*, Judge Emmons, in the opinion in the Circuit Court says: "The practical legislative and departmental action in Michigan is equally conclusive. Before considering it, we will refer to a few leading judgments and authors to show that upon principle it ought to have influenced the State decision, and must, as a matter of fixed law, guide our own."

"It is an axiom in American constitutional law that such departmental and legislative action will conclude the courts in all

cases where any possible interpretation can uphold actual investments and contracts."

The authorities to this effect are numerous.

The original Brief in this case gave a list of similar laws to this, passed by the Kansas Legislature, and in the decision of Judge Emmons, above referred to, is found a list of similar laws in States from which Kansas, as well as Michigan, adopted her constitution.

VI. Upon the sixth point suggested, the opinion of Judge Emmons in the case referred to, furnishes us with sufficient to attract the attention of the Court to the principle.

He says: "So obligatory is this rule deemed upon courts where contracts have been made in good faith, or where action has taken place, to overturn which would result in great evils, that when they could see no possible interpretation of the words of the Constitution, or of statutes to warrant what has been done, they simply declare that the fundamental law has been violated, as an indication of what they would hold in future cases, refusing to apply the rule to the destruction of what had been done in reliance upon the public acquiescence."

Again, he says: "A change is loudly demanded in our constitution, which shall in some degree limit the destructive effect of judicial interpretation upon contracts made by the citizens in reliance upon action of the sovereign power of the State. Without this, the list of cases already referred to where it was said that constitutional criticisms came too late, and those yielding blindly to practical construction with little reference to the clause construed, must be greatly lengthened. Without some organic remedy, the indications are that the courts, from the abundance of the law's technicalities, its presumptions of law when the proof of actual fact is excluded, its estoppels in pais when good faith closes the mouth of objection because the hand is full of another man's money, will deduce some rule which will enable them to declare an act unconstitutional and at the same time protect past transactions and an innocent community from the consequences of its invalidity. And this, in its practical effect, is the whole scope of those decisions of

the Supreme Court of the United States, which we now follow. * * * Resorted to only when the claims of good faith demand it, in each instance of its exercise all severe criticism is silent."

We have thus briefly suggested the points upon which we desire a re-argument of these cases, and have also briefly intimated the line of inquiry we would desire to pursue.

WILLEY, TERRELL & SHERMAN,
CLEVELAND, OHIO.
Attorneys for Petitioners.